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A POPULAR AND PRACTICAL INTRODUCTION

TO

LAW STUDIES,

AND

TO EVERY DEPARTMENT OF THE LEGAL PROFESSION,

Civil, Criminal, and Ecclesiastical :

WITH AN ACCOUNT OF

THE STATE OF THE LAW IN IRELAND, AND SCOTLAND,

AND

OCCASIONAL ILLUSTRATIONS FROM AMERICAN LAW.

BY

SAMUEL WARREN, ESQ., F.R.S.,

Of the Inner Temple, Barrister-at-Law.

*Simul ac duraverit etas
Membra animumque tuum, nabis sine cortice.—Hor.*

SECOND EDITION.

ENTIRELY REMODELLED, RE-WRITTEN, AND GREATLY ENLARGED.

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TO
JONATHAN PEEL, Esq.,

OF ACCRINGTON HOUSE, LANCASHIRE.

MY DEAR PEEL,

It affords me great gratification to inscribe to you this work, containing the results of some years' experience, and attentive observation of professional men, manners, and pursuits. Many of the topics discussed in it, have formed the subject of frequent conversation between us, during our intercourse at the Bar, in town, and on circuit; and I believe that upon most, if not indeed all, of them, we are agreed. I sincerely regret that circumstances have interrupted, though not our friendship, our close companionship: but I rejoice at the cause of it—that you should have been induced to retire from the Bar, in the prime of life, to enjoy the advantages of suddenly-augmented fortune, and also to sustain its responsibilities, by availing yourself,—I trust—in the public service of your country, of that learning and discipline, for which you are indebted to the noble profession you have quitted. Accept, then, this memorial of our friendship—this testimony to your talent—to your private worth—to the modest manliness of your character, and that unwavering honour and integrity, which earned you the respect of all who knew you. While you are enjoying your *otium cum dignitate*, an occasional glance at this work will remind you, I trust not unpleasantly, of scenes which you have quitted for ever, but amongst which my lot is cast for the rest of my life.

Believe me to remain,

My dear PEEL,

Your sincere Friend,

SAMUEL WARREN.

INNER TEMPLE,
July 20, 1845.

PREFACE

TO THE PRESENT EDITION.

THOUGH nominally a second edition of a book published by the author ten years ago, the present one is essentially a new work, of which the former may be considered as little more than an imperfect epitome. The reason of such a complete change both of plan and execution, has been, the author's conviction that the original work might be greatly improved, and made much more extensively useful.—Since it was published, he has had ten years' additional experience both as a pleader, and at the Bar; and during that period has, of course, had more extensive opportunities than he had previously enjoyed, of becoming practically acquainted with the profession, in all its departments. The chief results of his experience and observation, are now submitted to the profession and the public, with deference and anxiety. Though aware of the strong, practised, and accomplished intellects to whose scrutiny he has ventured to expose his labours, he hopes that this work will, at all events, evince,

on the part of its author, honesty of purpose, zeal in endeavouring to uphold the character and honour of the profession, and the pains taken to obtain, and communicate, correct information, on subjects of equal interest and importance, not only to those who have become, or intend to become, members of the profession, but also to those whose duty it is to advise them as to the selection of it. Whenever the author has felt at a loss, he has communicated with experienced and eminent persons in every department of the law, and obtained from them ample and authentic information. He here offers them his warm thanks for such services; particularly to those who have obliged him by revising some of the most important sheets of the work.

It has been the earnest endeavour of the author to exhibit the advantage—nay, the absolute necessity—of students devoting more time, and more persevering and systematic labour, to the acquisition of legal knowledge, and of the power of using it, than are, he is convinced, at present bestowed by the great majority of those who of late years have crowded, and continue to crowd, in such numbers to the Bar,—of those who, in the language of a distinguished lawyer of former days (Roger North), “are apt to press to the Bar, *when they are not half students*;—which is the downfall of more young lawyers than all other errors and neglects whatever.”* He has

* *Post*, p. 851 (n.)

also aimed at convincing students and junior practitioners, that they ought ever to regard the law as a **WHOLE**—as one great system, of which the different departments of the profession—however distinct, may seem, on a superficial view, its members and their functions—are *only parts*: and that an enlarged and accurate acquaintance with all those parts, will open, elevate, and strengthen the minds of students and practitioners, and enable them not only to discharge whatever class of duties they may undertake, with superior efficiency, but indefinitely augment the interest, and facilitate the acquisition, of legal knowledge.

With the present work is incorporated one which the author has for some years meditated offering to the public,—viz., an elementary and popular outline of the leading doctrines, and practice, of each of the three great departments of the law, Civil, Criminal, and Ecclesiastical. Some of these chapters—particularly those on Equity, Conveyancing, and Common Law—have cost him much labour; and he trusts that they will afford students a clear and correct idea of the subjects there discussed, and enable them to choose judiciously the particular department for which they may feel themselves most disposed, and best qualified. The author has constantly striven to select topics likely to prove interesting to students, and to invest those topics with such attractiveness in point of style and illustration, as lay within

his powers. The entire work is written upon a plan which is designed to render it, in a great measure, independent of those continual alterations in the machinery and working of the law, which are so calculated to perplex and dishearten students and practitioners,—with a view, in short, to *permanent* utility. The author has at the same time endeavoured to give a brief and succinct account of the origin and progress of those changes which, after fifteen years' legislative and judicial exertion, have undoubtedly placed the administration of the law upon a new and more satisfactory basis. Another object, which has been steadfastly kept in view, is, to demonstrate that these changes have not, nor could they have affected, the great REASONS and PRINCIPLES of the law: and hence the paramount necessity and advantage of aiming at an early and constant reference to *principles*, in the study and practice of the law. He whose mind is thoroughly imbued with legal principles, *can never go far wrong* in even the most sudden and difficult exigencies of practice: while the unprincipled lawyer—if we may be forgiven the expression—is continually floundering on into ridiculous, as well as fatal, error.—Two chapters have been devoted to an exposition of the existing state of the Common and Statute Law of Ireland—a matter of much more practical importance than is generally imagined;—and of the nature of the law, as well as the recently altered mode of administering it, in Scotland. The author has also

availed himself freely of the valuable writings of those eminent American jurists, Chancellor Kent and Mr. Justice Story; with a view to illustrating some of the variations existing between our own and the American administration of the Common Law, which may suggest useful and interesting analogies and comparisons, to lawyers on both sides of the Atlantic.

With reference to the introductory chapters of the work, which are devoted to the *general* education of persons designed for the legal profession,—the author has bestowed great pains upon them, and hopes they will be found to contain suggestions useful to all classes of students, whether intending to become barristers, or attornies and solicitors; but they are designed principally for the assistance of those who may feel conscious of falling far short of that superior and complete preparation, which has been obtained by others who have had the advantage of an University education. It is not expected, however, that any such person should sit down to peruse *every* book, or adopt the *precise* course of reading, suggested in the preliminary chapters of this work. Considering the different characters, habits, capacities, and qualifications of different persons, it is manifestly absurd to offer any particular line of study, for the implicit adoption of all classes of students.

The author has taken the trouble of collecting together

much practical information, concerning all branches of the profession, which, he believes, is to be found in no other work; and has ventured to offer, towards the close of it, a few practical hints and suggestions concerning the conduct of business, which may possibly be found useful to both young barristers, and young attorneys and solicitors. These suggestions are condensed into a very narrow compass, but contain the results of much personal observation and experience.

Students for the Bar, may rest assured, that notwithstanding the difficulty of *fairly* obtaining practice, occasioned by the fearful extent to which our profession is over-stocked, the persevering and systematic study of the principles of the law, is more necessary than ever, to secure any measure of real success, and affords absolutely the *only* chance of attaining eminence. Mediocrity and superficiality may suffice for securing, and even keeping for a while, by the aid of strong connection, an inferior position; but profound learning, especially if coupled with eminent talents, and guided by discretion, is as likely as ever—possibly, at present, more so than ever—to urge on its possessor to distinction.

This work has cost its author the severe and unremitting labour, during every moment which he could spare from business, of the last twelve months: and if it shall meet, notwithstanding the errors and defects which

may be detected in it, with the approbation of those persons of candour and judgment, whose opinion is decisive of the fate of every work submitted to the profession, and if it shall contribute effectually to assist students and others for whom it is designed, the author's exertions will have been abundantly rewarded, and he will feel that he has not altogether failed, in attempting to discharge some little portion of *that debt which every man, says Lord Bacon, owes to his profession.**

KING'S BENCH WALK, INNER TEMPLE,
20th July, 1845.

* Law Tracts.—*Vide Post*, p. 758.

PREFACE

TO THE FIRST EDITION.

THE design of the following work, and the motives of the author in undertaking it, are explained at so much length in the INTRODUCTION, as to leave him little else to do here, than bespeak the indulgence of his professional brethren.

It was not without much hesitation, and distrust of his fitness for such a task, that he took upon himself to advise on the choice of the law as a profession, and on the prosecution of it as a study. But for the encouragement which he, from time to time, received from numerous able and experienced friends, in all departments of the profession,—whose valuable services he takes this opportunity of thankfully acknowledging,—he should long ago have abandoned his task in despair. The subject he has chosen is so extensive, the design so difficult of execution, and the opinions which he has had to consider were so conflicting, that he cannot review his labours, without a consciousness that many imperfections may be detected

in them, if subjected to keen and unfriendly scrutiny. Hostile criticism, however, he will not anticipate from the liberal members of a profession to which he shall ever esteem it a very high honour to belong. Should, on the contrary, his efforts to smooth the rugged access to legal science, and exhibit to the public a just and interesting delineation of the English Bar, prove successful—should this, his humble contribution to the stock of elementary professional literature, be accepted, the time and pains he has expended upon the ensuing pages, will have been richly recompensed.

KING'S BENCH WALK, INNER TEMPLE,
20th April, 1835.

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LAW STUDIES,

ETC. ETC.

CHAPTER I.

PRELIMINARY VIEW OF THE PRESENT STATE OF THE BAR, ITS STUDENTS AND PRACTITIONERS.

. THE English Bar is, and ever must be, one of the most splendid and attractive of professions, in respect of the great number and value of the prizes which it presents for the free and fair competition of its members. Those prizes consist, not only of large fortunes, in acquiring which, moreover, are also gained great reputation and influence in society; but of a long series of Offices and Employments, all lucrative and dignified in proportion to their eminence—*all connected with the administration of justice*; and therefore constituting the proper bestowing of them, a matter of grave concern to every member of the community,—the subject of stern and unrelaxing public scrutiny. Such a glittering array of substantial honours and distinctions, while dazzling the aspiring eye which contemplates them, cannot fail, in the case of a *thoughtful* observer, to suggest the certainty that they cannot be obtained without very great difficulty. The best

and most highly-trained intellects in the kingdom, he will reflect, are, with their utmost energies, constantly competing for them; and numerous as are the prizes, they must ever bear a small proportion to the constantly-increasing number of candidates;* leaving those who, from a variety of circumstances, not connected with personal qualifications, are unsuccessful, to constitute a body of thoroughly competent and unsparing critics of the mode in which their successful rivals acquit themselves, not only in their progress towards success, but in the performance of the truly arduous duties which success has devolved upon them. An incompetent judge cannot stand his ground one month before the array of THE BAR, and the exposure and denunciation of a free, vigilant, and powerful PRESS. It is well that it should be so: that for the due discharge of *such* duties there should exist this double security.

Can too great pains be taken to arrive, as early as possible, at a just estimate of the nature of the difficulties above alluded to, and the mode of overcoming them, before being finally committed to the attempt? And would not an earnest endeavour, by one only moderately well qualified for the task, to supply useful, practical information, at so important a period of life as that at which the Bar is usually entered, have some title to be received with favour and forbearance?—Such were the motives and objects

* The number of BARRISTERS, &c. in town and country, (according to the Law Lists of those years) in 1832, was 1130; in 1843, it was 2484!

The number of Practitioners under the Bar, viz., special pleaders and conveyancers, in 1832 was 110; in 1843, 135.

The number of attornies and solicitors in 1832 was 8061; [i. e. 2555 in London, and 5506 in the country.] In 1843 the number of attornies and solicitors was 9939; [i. e. 3148 in London, and 6791 in the country.]

with which this work was originally presented to the public, in 1834-5; between which time and the present [1844] an unusually large edition has been exhausted, and a second called for; no other work upon the subject, moreover, having been published, or even announced, during that interval.

Ten years' watchful observation of every department of the legal profession, since the original publication of this work, and no inconsiderable practical experience, have satisfied the author upon three points.—*First*, the advantage, possibly the necessity, of *some* work of this description. *Secondly*, the inadequacy of *this* work in its original form (notwithstanding the favour with which it has been received, and for which the author is deeply grateful,) to afford that advantage, and supply that necessity, to as great an extent as was desirable, and practicable. *Thirdly*, his present improved means (with a due sense of his own deficiencies, but an honest and diligent use of his faculties, experience, and opportunities,) of offering this work to the public with some valid pretensions to earn the confidence, and advance the interests, of that important class of persons for whom it is designed.

Notwithstanding its author's having been engaged, when it was originally composed and published, for a few years only in practice, and that, too, *under* the Bar; having, after seven years' experience *at* the Bar, recently submitted the work to a searching examination, he is satisfied that the opinions and conclusions originally expressed in it were, and are, substantially sound and correct. His subsequent opportunities, however, have so greatly enlarged the sphere of his observation, as to enable him to form a more exact estimate, and take a more com-

prehensive and practical view, of the qualifications and deficiencies of persons intending to become, and becoming, members of the English Bar ; of the many serious difficulties to be encountered in prosecuting the study and practice of that Profession ; and of the best mode of obviating and overcoming those difficulties. He has endeavoured faithfully to discharge the duty incumbent on one entering upon so arduous an undertaking as the present ; but with a lively consciousness of the delicacy and difficulty of many of the topics which are, and ought to be, frankly discussed in this work. He is perfectly aware, for instance, that a large majority of applicants for admission to the Bar, come fresh from Oxford and Cambridge ; that very many of them have so fully availed themselves of the advantages afforded by those great and glorious Universities, as to enable them to dispense with all those portions of this work which do not directly and practically concern the profession they have entered, or meditate entering. But he is also aware that some few of this class come to the Bar *without* having duly availed themselves of the advantages afforded by a university education. Some of them, again, had been previously trained in the public schools and a few other first-rate private seminaries, while others had not enjoyed such early advantages ; and now feel, and know, in their own hearts, that what they are presumed to be, and what they are presumed to have, they really are not, they really have not,—and bitterly regret this, when regret is very nearly too late,—when the time has arrived for selecting a profession, and that is chosen where incompetence and ignorance are quickly detected, and sometimes publicly exposed, amidst the surprise and ridicule of that truly formidable body, the

English Bar. Many, again, who contemplate becoming candidates for admission to the Bar, have not only received no university education, but no *adequate* education at all; or, having received a good private education, have, from negligence, indolence, or other causes, very nearly lost all traces of it; and yet, prompted, possibly, by a just consciousness of talent, and by ambition, venture to enter a profession which requires for success all the advantages, in respect of discipline and knowledge, that a first-rate education can supply. Finally, there are, unquestionably, some who approach the profession of the Bar, flattered by foolish friends, and urged by vulgar, ignorant, incompetent advisers, who are totally unfitted for it in respect of either moral principle, character, habits, education, knowledge, or ability: and who ought to be sternly stopped at the very threshold, by a demonstration of their absurdity and presumption in coming to the Bar: of the misery into which they are about to plunge themselves—and of the discredit which they are about to entail, to some extent, upon that Bar, where the possession of virtue, gentlemanly feeling, talent, and learning, is rigorously exacted—where the presence or absence of such qualifications is quickly detected, appreciated, and rewarded accordingly.

A work designed for the guidance of such a miscellaneous class of persons, must needs contain matter which may, by some, be deemed superfluous, by others indispensable; and considerations, such as the above, occasioned the original composition,* and the present retention, revision,

* The author feels great satisfaction in quoting the following remarks upon this part of his labours, communicated to him soon after their original appearance, by the late Mr. Justice Park, with whom the author had no personal acquaintance—a learned and able judge, and than whom, a

and improvement of the introductory and *general* chapters of this work. With these preliminary observations, offered with the utmost degree of diffidence consistent with a fair reliance on his own judgment, the author will proceed to those general remarks which appear to him calculated advantageously to introduce the reader to the subject-matter of this work.

There is, perhaps, no profession which demands for its successful prosecution so large an amount of PERSONAL QUALIFICATION—of ability to encounter with difficulty, as THE BAR. However great may be the advantage enjoyed by some, of entering the profession, backed by that influence and connection which secure an almost immediate introduction to business, such an advantage cannot compensate for the want of personal fitness to discharge the difficult and responsible duties of a practising Pleader, Conveyancer, or Barrister. An incompetent person is quickly detected, and must then, necessarily, be deserted by even his most zealous supporters, whose interests, and those of their clients, he is found to injure, whenever he meddles with them.* Of what avail, then,

more high-minded man never adorned the Bar, or the Bench.—“They” (the introductory general chapters) “have given me great satisfaction. They “remind me much of the beautiful treatises of the great Chancellor “D’Aguesseau of France upon the character and duties of advocates. I have “always been most anxious to maintain the dignity and respectability of the “Bar, which seems also to be your great object ; and I am happy to see that “you have constantly in your mind, though not, in terms, expressed in your “book that important question, *Quid leges sine moribus proficiunt ?*”— • • 12th May, 1835.

* “I have chosen for my sons, or rather, they have chosen for themselves,” continued Mr. Percy, “professions which are independent of influence, and in which it would be of little use to them. Patrons can be of little value to a lawyer or physician. No judge, no attorney, can push a lawyer up beyond a certain point ; he may rise like a rocket, but he will fall

is a professional connection, if it bring business for the discharge of which its possessor is incompetent? It serves only to advertise his ignorance and presumption with fatal effect. *The prosperity of fools, says the wise man, shall destroy them.* The failure which then ensues, is accompanied by circumstances of inexpressible mortification and agony; and is generally irretrievable.

As for great family connections, so decisively available in the Church, the Army, and the Navy, they are often found, by the ambitious *but incompetent* law-student, to be little else than a splendid source of disappointment. In some professions and callings a man may to a great extent, succeed, as it were, by deputy—by availing himself of the exertion and assistance of others—may play Bathyllus to Virgil; may rely on many adventitious circumstances: but, at the Bar, it is otherwise. Whoever enters that field of intense rivalry—of eager contest for distinction, must assume the motto of *Proprio Marte*; must really rely upon his own mental vigour from the instant of starting in the desperate race, to that of reaching the goal of legal eminence.

“If you give way
Or edge aside from the direct forth-right,
Like to an enter’d tide they all rush by
And leave you hindmost.” *

like the stick, if he be not supported by his own inherent powers. Where property or life is at stake, men will not compliment, or even be influenced by great recommendations. They will consult the best lawyer and the best physician, whoever he may be.”—*Patronage*, by Miss Edgeworth—a tale worthy the perusal of the youthful student.

En passant—to give the Devil his due—the admirable illustration of the rocket, is taken from Thomas Paine!

* *Troilus and Cressida*, Act iii., Scene 3.

The personal fitness above spoken of, is exacted, moreover, by a profession full of peculiar difficulty in the acquisition and use of its learning—a profession of which Sir Edward Coke truly said* that, “the study was abstruse and difficult, the occasion sudden, the practice dangerous.” The great extent; the “variety almost infinite;” the complexity and minuteness of knowledge required by the exigencies of daily practice; the often necessarily brief opportunities afforded to prepare for the discharge of most difficult business; the quick detection—the public and perilous exposure, of incompetency, render the Bar indeed a formidable profession: and strange it is, that this should be the one so signally destitute† of any appropriate, systematic, and uniform method of tuition. Where is such to be looked for? There are LECTURES read on different branches of the law, at the Universities of Cambridge and Oxford; and at King’s College, the London University, and the Law Institution, in the metropolis; but there is the strongest reason for believing that lectures are, as will be hereafter explained, a most inefficient mode of communicating practical legal knowledge. Then there are the *chambers* of pleaders, conveyancers, equity draftsmen, and barristers in the Four Inns of Court; where the student, however, is too generally plunged into varied and difficult business, without any adequate preparation to encounter it. As for any assistance to be derived from books, some fifteen or twenty “Treatises on the Study of the Law” have been

* Preface to his Book of Entries.

† “Of all the professions in the world that pretend to book-learning, none is so destitute of institution as that of the common law.”—*Roger North’s Disc. on the Study of the Law.*—[See the Note on page 9.]

published at long intervals, during a couple of centuries, few of which are applicable to the circumstances of the present day ; While Blackstone's Commentaries, Wynne's *Eunomus*, and Sullivan and Wooddeson's *Lectures*, great portions of all of which have now become obsolete—are the only works of consequence which make any pretension to the character of *Elementary* introductions to the general study of the law—none of them being applicable to its present state. This is, in truth, the short sum of all the “institutionary assistance” at present within the reach of a student ; who, *in the absence, moreover, of any compulsory course of legal study*, is driven at length to rely upon his own desultory, and often ill-directed efforts, and the precarious and conflicting suggestions of individuals ; and thus it is, that every passer-by directs the anxious and perplexed pilgrim to approach the shrine of legal learning by a different route ; that perhaps no two individuals can be found to concur in recommending a course of elementary study. Even thus it was in Roger North's* time, who complains—“that each student is left to himself, to enter at which end he fancies, or as accident, inquiry, or conversation, prompts. And such as are willing,” he proceeds, “and inquisitive, may pick up some hints of direction, but generally the first step is a blunder ; and what follows, loss of time, till even out of that, a sort of righter understanding is gathered, whereby a gentleman finds how to make a better use of his time : and of those who are so civil as to assist a novice

* Roger North was a younger brother of the first Earl of Guildford (Lord Keeper of the Great Seal under Charles II. and James II.), and was appointed Attorney-General under the latter Sovereign.

with their advice, what method to take, few agree in the same,—some say one way, some another, and amongst them rarely any one that is tolerably just. Nor is it so easy a matter to do it, that every one should pretend to advise: for most enter the profession by chance, and all his life after is partial to his own way, though none of the best; and it is a matter of great judgment, which requires a true skill in books, and men's capacities, so that I scarce think it is harder to resolve very difficult cases in law, than it is to direct a young gentleman what course he should take to enable himself so to do.”*

Ought it to be so? Is this dealing fairly by the most powerful profession, perhaps, in the world?†

‘Nevertheless,’ says one, ‘thousands have succeeded, and splendidly, despite this lack of professional education.’ True; yet at what a vast and excessive cost of time and labour! But consider what health, what prospects, what lives, have been sacrificed to no purpose! How many thousands, and those, too, of the most highly gifted, have either been deterred from entering the legal profession, or after a brief unsatisfactory attempt to cope with its difficulties, abandoned it in despair!

Though the Bar presents incomparably the most exciting and brilliant scene of action afforded by any of the peaceful professions, its first access is frequently disheartening, even to the point of despair. Take the case of one who has not had the advantage of a college education—who is of humble family, and of straitened circumstances.

* Discourse on the Study of the Law, pp. 2, 3.

† See the Supplementary Note at the end of this Chapter.

Shall it be said haughtily that he ought not to attempt the coming to the Bar? Forbid it everything that is generous, noble, and just! Let him come, and welcome—if he be able to pass through the preliminary ordeal of difficulty and privation, *with honour*. His eye is as bright with intellect, his heart swells with as pure and strong an ambition, as that of his wealthy or aristocratic rival, who, flushed, perhaps, with academic honours, confident amid “troops of friends,” is borne to the scene of contest with the cheering assurances of rapid distinction. The former, poor soul! has no kind friend to take him by the hand; “no one cries ‘God bless him,’”—except, perhaps, a little circle of trembling relatives, whose hearts are very heavy for him. What is he to do? Who is to chalk out his course? He bethinks him of buying some book on the study of the law, and goes into a bookseller’s shop, according to whose caprice or interest he purchases, either a meagre epitome of the forms necessary upon entering an Inn of Court, or a work which perplexes him with legal discussion, or, like one now lying before the writer, balks him with remarks most “stale, flat, and unprofitable,” upon ‘memory,’ ‘application,’ ‘ambition,’ and ‘the desire of excellence!’ He then hastens to the Treasurer’s Office, in one of the Inns of Court, where he hears of ‘certificates of his respectability,’ bonds, sureties, deposits, examinations; an outlay of near 150*l.* before one step further can be taken; then a hundred guineas a year for two or three years to a special pleader, conveyancer, or barrister; various expensive books to be purchased, and more expensive chambers or lodgings engaged. Perhaps he is equal to all this; and having duly obtained certificates, undergone examinations, and given and procured securities for his

future good conduct, is, at length, enrolled a "Member of the Honourable Society of —," and left to shift for himself, with no definite notions of the course he is to pursue, further than to engage himself for a twelvemonth with some teacher of the law. There, even with the best, he must expect to be in a mist for months; and when it is cleared away, he may yet see but a dreary prospect before him!

Surely, now, to such a person, a publication like the present, containing, it is hoped, a plain and intelligible chart of his course for some years, showing him, in short, how to approach the legal profession—and, having entered it, what to do, how to do it, and what to leave undone; combining all useful practical information, drawn from approved sources, with the results of individual experience, would not have been unacceptable!

The case above imagined is of far greater frequency than is generally supposed. How much misery might have been avoided by a work of this description falling in the way of sanguine persons disposed to commit themselves precipitately to the profession of the Bar, without adequate powers of endurance, pecuniary means, mental capacity, or physical vigour! How many instances have come under the author's notice, during the last ten years, of persons who, having bestowed a candid and attentive perusal upon this work, have prudently abstained from following up their hastily-conceived intention of coming to the Bar, and betaken themselves to other modes (for which they were better fitted) of acquiring a respectable and honourable livelihood! Nor, it is conceived, will such a work be deemed superfluous or unacceptable by the bulk of candidates for the Bar, however favourable the auspices under

which they may enter an Inn of Court ; for in it may perhaps be found many useful matters, at the moment when most calculated to be serviceable, which would not otherwise have been called to their attention at all.

‘But,’ it may be answered, ‘there are the London Law LECTURERS: why not seek for such information from them?’ Without offering any observations with reference to the Law Lectures which have been for some years, and continue to be, delivered by barristers of competent learning and ability, at King’s College, the London University, and the Law Institution, (the last designed for the clerks of attornies and solicitors, whose course of legal education has, within the last ten years, been, in all respects, very greatly improved, under the auspices of the experienced Directors of the Institution in question,) the author would mention one circumstance tending to show the great difficulty of constituting *lectures* a part of legal education. The Benchers of the Inner Temple, some years ago, resolved to give the system a fair trial ; and engaged the services of two gentlemen of the highest eminence, in respect of position at the Bar, reputation, talent, and learning, (Mr. Starkie and Mr. Austin,) to deliver lectures on law in the Inner Temple Hall, to be gratuitously attended by all members of the Inn. The attendance at first was rather numerous, but rapidly declined, and at the close of the first course, the idea was abandoned. Was not this a fair trial ? The lectures delivered were every way worthy of the distinguished gentlemen who delivered them, of the auspices under which they were introduced, and the object to be attained. Yet they failed ; and the author believes it to be the almost universal opinion of the profession, that, from various causes, the attempt will not be repeated ;

and that, were the attempt made, it would not be successful.—Not entering at large, for the present, into the merits and demerits of the lecturing system, which will be briefly considered hereafter,* it may be here observed, that there is one respect in which all the law lecturers, of whom the author has had the means of judging, have seemed to him at fault. They do not attempt to enforce systematic mental discipline, to facilitate the acquisition of legal habits of thought and application. *Law* they give the student in abundance; few leading topics are omitted to be, perhaps, carefully parcelled out for him; but there they stop. No persevering attempt is made to teach him how to make this law *thoroughly his own*; the lecturer is, in short, little else than a speaking treatise, digest, or compendium; and unless the student take very copious and accurate notes, all he has heard will share the fate of the Scotchman's "thorough-paced doctrine," which went "in at æ lug, and out at the ither." And suppose him to have succeeded in preserving the greater portion of every lecture, after great pains, and much time devoted to the task; what is his real advantage over him who has access, as all may, to the numerous and excellent text-books, to which the lecturer himself is indebted for his compilations? † In a

* Post, Chapter ix.

† "It is not," says the learned Bishop of Llandaff, Dr. Coplestone, speaking of the system of lecturing, "it cannot be the most effectual means by which instruction is to be conveyed to the minds of the majority of students."—*Reply to the Calumnies of the Edinburgh Review against Oxford*, p. 149.

Hear also Dr. Johnson:—

"People have now-a-days got a strange opinion, that everything should be taught by LECTURES. Now I cannot see that lectures can do so much good as reading the books from which the lectures are taken. I know nothing that can be best taught by lectures, except where *experiments* are to be shown. You may teach Chemistry by lectures; you might teach making

word, these lecturers present the student with, no doubt, a well-tempered weapon, but make no attempt to teach him *how it must be used!*—This is at once the sum of the author's objections to law lectures, and an intimation of the main object which he has proposed to himself in the present undertaking.

It is not his design to supply information merely as to the nature of legal studies and the most advantageous modes of prosecuting them; but to take a wider range, and include many topics of the utmost importance and interest to all who are desirous of reflecting, and of being early and thoroughly advised, upon so important a step as embracing the Bar, in order that they may do so prudently and with a reasonable hope of success. These are topics scarcely fitted to be introduced into Lectures; and not hitherto,

of shoes by lectures."—*Boswell's Life of Johnson*, vol. ii. p. 6; and see *ib.* vol. iv. p. 98.

"Thus," says Dr. Arnot, "no treatise of natural philosophy can save, to a person desiring full information on the subject, the necessity of attendance on experimental lectures or demonstrations. Things that are seen, and felt, and heard,—that is, which operate on the external sense, leave on the memory much stronger, and more correct impressions, than where the conceptions are produced merely by verbal description, however vivid."—*Et. Ph.*, pref. xlviii.

"The multiplication of books, the facility of procuring them, and the custom of reading them," says Dr. Parr, "may be considered as reasons for the diminished usefulness of lectures."—"The tutor can interrogate where perhaps the lecturer would only dictate; and therefore, in his intercourse with learners, he has more opportunities for ascertaining their proficiency, correcting their misapprehensions, and relieving their embarrassments."—*Works*, vol. ii. p. 568.

It has also been suggested to the author, by an acute and learned friend, (now no more,) that there is this further objection to the system of lectures, viz., it is one necessarily assuming what cannot be,—that each pupil has the same abilities and the same acquirements. Now in private teaching, the tutor can adapt his instruction to the peculiar wants of his pupils. The attention, too, is constantly kept awake by the consciousness that *each* is personally addressed.

that the author is aware of, made the subject of publication by the press.

The topics discussed in this work relate not merely to the student's mental and physical fitness for the profession of the Bar, but to the general conduct to be observed in the character both of student and practitioner of the law, as a member of a most conspicuous and important public profession; to the mode of supplying possible defects in early education; to the selection of the most appropriate and desirable department of the profession in which to practise,—by pointing out in detail the qualities requisite for success in each, and explaining fully and distinctly the actual state of the law and its professors in all its branches;—to the important and difficult question, how the legal student should commence his studies; with a variety of practical suggestions for the successful prosecution of both the study and practice of the law.

It is hoped that a work of this description, executed with moderate judgment and great care, as it had certainly been long wanted before the original publication of the present work in 1835, so is likely to be of *permanent utility*, unimpaired, except as to minor matters, by the changes from time to time effected in the machinery and details of the law, however frequent and extensive those have been of late years, or may be in time to come.

Very great alterations have been effected within the last fifteen years in every department of the law—in that of the *Common Law*, of *Conveyancing*, *Equity*, *Sessions* and *Criminal law*; and all of these changes have an important bearing upon the position and prospects of those meditating, and effecting, an entrance into the legal profession. Generally speaking, the modern system of administering each

of these branches of the law has been greatly improved and simplified. The law of Real Property—the study and practice of CONVEYANCING,—must always be difficult, from the complicated nature of the transactions with which it has to deal, and the refined and subtle distinctions to which these transactions necessarily give rise. Many antiquated portions, of excessive complexity, have, however, been recently got rid of—particularly those connected with the ancient modes of assurance by *Fine and Recovery*—for which an entirely new system has been substituted*. But the student must bear in mind that for many years to come it will be necessary to be well acquainted with the former system; as “all men’s titles,” says Sir Edward Sugden, the present very learned Lord Chancellor of Ireland, “must for many years depend upon the law of fines and recoveries†.” Since the passing, in the year 1833, of this statute, various other important acts relating to the devise and conveyance of real property have been passed—the last of which is that which received the royal assent on the 6th August, 1844, and is to come into operation on the 1st January, 1845,—“For simplifying the Assurance of Property by Deed.” This is a very short statute, containing only fourteen brief sections, but effecting some extensive changes, and several undoubted improvements‡. That most interesting to the student

* See stat. 3 & 4 Will. IV., c. 74, intitled “An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance.”

† See *post*, ch. viii.

‡ The scope and effect of this important statute will be found briefly and clearly explained in the introductory observations contained in Mr. Davison’s “Concise Precedents in Conveyancing, adapted to the Statute of 7 & 8 Vict., c. 76, with Practical Notes and Observations on the Act,” now passing through the press.

is effected by s. 8, which, by converting contingent remainders into executory limitations, will ere long render totally obsolete the most subtle and perplexing portions of *Fearne * on Contingent Remainders*: but the observation made by Sir Edward Sugden concerning the abolition of Fines and Recoveries, applies also to that of Contingent Remainders; viz., that for years to come the study and practice of conveyancing will have to deal with transactions effected by means of the abolished law, which must consequently be retained by those who have acquired it, and learnt by those who have not. While the combined effect of all these important changes is to simplify conveyances, and remove some of their senseless redundancies of expression, it undoubtedly also renders the retention or acquisition of the old law, for some considerable time to come, hardly less important, than the acquisition of the new law.

Any alterations effected in the law regulating real and personal property, must be immediately felt in the department of EQUITY, and ought of course to be thoroughly understood by its practitioners; but there have not been recently any material or organic changes effected in the practical proceedings of those courts. A great *and increasing* proportion of the most important business of the country, occasioning litigation, finds its way into the courts of equity, proportionally adding to the labours and emoluments of its practitioners. The pressure of

* This distinguished author (Charles Fearne) was a member of the Inner Temple, and died on the 21st January, 1794, aged only forty-five. He was a man of a very subtle and strong intellect, and delighted in metaphysical and philosophical speculations. The work mentioned in the text has long been a first-rate legal text-book, characterised by accurate and profound learning.

business was at length found so great, as to induce the legislature, in the year 1841, to erect two additional courts, presided over by two Vice-Chancellors; and the effect of this alteration has been greatly to distribute and equalise business at the equity bar.

SESSIONS' law, or the law administered at sessions, and on appeal thence to the Court of Queen's Bench, is one to which the attention of the young common law *bar-rister* is generally earliest directed, and has also undergone great alterations, owing principally to the changes effected recently in the Poor Laws. A measure, however, was announced by the Secretary of State for the Home Department (Sir James Graham) at the close of the session of 1844—viz., for reducing all the existing heads of *Settlement* to one—which, if carried into effect, will occasion indeed a sweeping alteration in the existing sessions' law. The CRIMINAL LAW has undergone vast alterations within the last fifteen years; but one of far greater practical importance than any of them, is the contemplated consolidation of the criminal law into one statute, by means of the Bill introduced by Lord Brougham, with the sanction of the Criminal Law Commissioners, into the House of Lords, and ordered to be printed, towards the close of the last session (1844.) We have seen and examined this Bill. If it be passed into a law, it will get rid of many glaring anomalies, and render comparatively simple and accessible the study and practice of the Criminal Law. It will occasion sad havoc among the existing books on the practice of the Criminal Law—a circumstance not to be lost sight of by the student. It may be advisable to state a little more at length the general nature of those great changes in the COMMON LAW department,

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old system, almost at once

The father of Sir Matthew Hale—was
practice of the law, because he could
g colour in pleading, which, as he thought
of Hale, p. 2.

which have during the same interval been effected, and upon the whole with so favourable an influence upon the student and practitioner in that branch of the profession.

Down to the year 1832, the system of common law pleading and practice supplied the student, during the greater period of his pupilage, with little else than the most degrading and unprofitable drudgery. It presented to his despairing eyes a mass of vile verbiage,—a tortuous complexity of detail, which defied the efforts of any but the most creeping ingenuity and industry. There was really everything to discourage and disgust a liberal and enlightened mind, however well inured to labour by the invigorating discipline of logic and mathematics. The deep and clear waters—so to speak—of legal principle, there always were, and will be, for *they* are immutable and eternal; but you had to buffet your way to them through “many a mile of foaming filth,” that harassed, exhausted, and choked the unhappy swimmer, long before he could get sight of the offing. Few beside those who had had the equivocal advantage of being early familiarised with such gibberish, as “special general imparlance,”—“special testatum capias,”—“special original,”—“testatum pone,”—“protestando,”—“colour *,”—“*de bene esse*,” &c. &c. &c., could obtain a glimmering of daily practice, without a serious waste of time and depreciation of the mental faculties. Let the thousands who, under the old system, almost at once adopted and abandoned

* The father of Sir Matthew Hale—worthy soul—actually “gave over the practice of the law, because he could not understand the reason of giving colour in pleading, which, as he thought, was to tell a lie!”—*Burnet's Life of Hale*, p. 2.

legal studies, attest the truth of this remark *. There was, in short, everything to discourage a gentleman from entering, to obstruct him in prosecuting, the legal profession. Recently, however, a great change has been effected. There has been a real reform—a practical, searching, comprehensive reform of the common law; a shaking down of innumerable dead leaves and rotten branches; a cutting away of all the shoots of prurient vegetation, which served but to disfigure the tree, and to conceal and injure its fruit. Now you may see, in the Common Law, a tree noble in its height and figure, sinewy in its branches, green in its foliage, and goodly in its fruit. May it be permitted, however, to express an humble but earnest hope, that the gardener will know *when to lay aside his knife!*

How, then, do we stand? Practically thus.

A single statute, of twenty-three short sections only—the “UNIFORMITY OF PROCESS ACT” (2 Will. IV., c. 39), passed on the 23d May, 1832, with the significant recital that “the process for the commencement of personal actions, in his Majesty’s superior courts of law at Westminster, is, by reason of its great variety and multiplicity, very inconvenient,” has swept away most of what was senseless, complicated, and bewildering in practice, and substituted a plain and uniform method in its stead. Adieu, now, for ever, to the barbarous jargon of ‘Originals,’ ‘special originals,’ ‘testatum pones,’ ‘bills,’ ‘latitats,’ ‘quo minus,’ ‘attachments of privilege,’ ‘ac

* “*Emisit me mater Londinum,*” says the ‘famous antiquary,’ Spelman, “*juris nostri capeasendi gratia; ejus cum vestibulum salutassem, reperissemque linguam peregrinam, dialecticum barbarum, methodum inconcinnum, molem non ingentem solum, sed perpetuis humeris sustinendum, excidit mihi (fateor) animus!*”—And see *Burke’s Abridgment of English History*, book iii., ch. ix.

etiams, 'essoigns,' &c. &c. &c.; thorns, briars, and rubbish, encumbering and choking up the porch and avenues to the legal edifice! The modes of *commencing personal actions* in the superior courts of common law, were by this statute reduced to only three; viz., Writ of Summons, Writ of Capias, and Writ of Detainer; the first being applicable to non-bailable actions, the other two to bailable actions; while the rules of practice relating to them were greatly abbreviated and simplified. Six years afterwards, however—viz., on the 16th August, 1838,—by stat. 1 & 2 Vict., c. 110, the legislature deemed it expedient to abolish arrest on *mesne* process (except in the case specified in the act), considering it "unnecessarily extensive and severe" (s. 1); and enacted (s. 2) that "all personal actions in the superior courts of law at Westminster, should be thenceforth commenced by *writ of summons* only." This writ is now, therefore, "alone in its glory," and thus, together with imprisonment for debt on *mesne* process, has been utterly swept away another great and most intricate head of practice—a most difficult and disheartening object to be encountered by the student on the very threshold of his studies. It is doubtful, moreover, whether arrest on *final* process will not speedily follow the fate of arrest on *mesne* process; and thus, whatever may be thought of the *policy* of the measure, another extensive section of difficult law will be dispensed with. During the session of 1844, this change has been actually effected with reference to all cases where the sum recovered in an action shall not amount to 20*l.* independently of the costs (stat. 7 & 8 Vict., c. 96, s. 57). This is, in all probability, only a harbinger of the total abolition of arrest on final process.

Those who shall henceforth enter the profession, will

not be able to appreciate the prodigious changes of which we have been speaking, save when their eyes are directed to hundreds of cancelled pages in the books of practice—and those pages, too, by far the most difficult and forbidding of any. The only wonder is that much of this was not done a century or two ago. How truly preposterous was the former system of rigidly appropriating to the respective courts of King's Bench, Common Pleas, and Exchequer, distinct and very different writs, each entailing all manner of complicated details, swelling the ordinary books of practice to an unsightly bulk, and endlessly perplexing and misleading the most skilful practitioners; how absurd and degrading to common sense the fictions on which they depended, how monstrous the abuses and oppressions which they engendered!—Then, again, the mysterious obscurity in which the Terms have been for ages invested, has been recently dissipated, with all its prolix and perplexing incidents. You need now no longer puzzle your head for a whole day about the mode of *dating* a declaration, formerly a difficult and often dangerous task! Writs are no longer 'returned' * on days whose denomination is borrowed from the Popish ritual—"on — next, after fifteen days of St. Hilary,"—" — after the

* By a writ's being "*returnable*" is meant, that there is always some person who is, by law, compellable to bring it into the court from which it issues, and to certify to that court what has been done in pursuance of such writ. Writs are letters missive from the Sovereign, commanding something either to be done, or not to be done: are *tested* (as it is called, *i. e.*, *witnessed*), in the name of some person appointed by law for that purpose: and directed to the person on whom the command is imposed. See "*Smith's Elementary View of an Action at Law*, pp. 42, 43, (2d Ed.) The writ of summons, which is always addressed to the defendant personally, does not mention any return day whatever: the return being regulated by the service of the writ.

morrow of the Purification,"—— "the morrow of All Souls,"—"of Saint Martin," but at fixed and definite periods, wholly irrespective of Term or Vacation; the distinctions between which, with all the numerous and intricate proceedings dependent upon them, are now, for most practical purposes, done away with, and business, consequently, distributed evenly through the year.* Thus far as to the altered periods and modes of *commencing* legal proceedings. The 'blessed amending hand,' however, to adopt the language of the famous Edmund Plowden,† has grasped, as it were, the very heart-strings of the law: the statute for the "Limitation of Actions," &c. (3 & 4 Will. IV. c. 27, s. 36,) has swept away—shade of Fitzherbert!—indiscriminately between fifty and sixty species of actions;‡ a most fertile source of difficulty and confusion

* The interval between the 10th of August and the 24th of October is now almost entirely struck out of the legal year. See 2 Will. IV., c. 39, s. 11,

† "We will conclude (says Lord Coke, in closing his Institutes,) with the aphorism of that great lawyer and sage of the law (which we have heard him often say), "*Blessed be the amending hand.*"—Lord Coke's Fourth Inst. Epil.

‡ The catalogue of these ancient cobwebs is worth extracting:—

"No writ of right patent, writ of right *quia dominus remisit curiam*, writ of right in *capite*, writ of right in *London*, writ of right close, writ of right *de rationabili parte*, writ of right of advowson; writ of right upon disclaimer, writ *de rationabilibus divisis*, writ of right of ward, writ *de consuetudinibus et servitiis*, writ of *cessavit*, writ of escheat, writ of *quo jure*, writ of *secta ad molendinum*, writ *de essendo quietum de thelonio*, writ of *ne injuste vexes*, writ of *meane*, writ of *quod permittat*, writ of *formedon in descender*, in *remainder*, or in *reverter*; writ of assize of *novel disseisin*, nuisance, *darrein presentment*, *juris utrum*, or *mort d'ancestor*; writ of entry *sur disseisin* in the *quibus*, in the *per*, in the *per* and *cui*, or in the *post*, writ of entry *sur intrusion*, writ of entry *sur alienation*, *dum fuit non compos mentis*, *dum fuit infra ætatem*, *dum fuit in prisona*, *ad communem legem*; in *casu proviso*, in *consimili casu*, *cui in vita*, *sur cui in vita*, *cui ante divortium*, or *sur cui ante divortium*, writ of entry *sur abatement*, writ of entry *quare ejecit infra terminum*, or *ad terminum qui preteriiit*, or *causâ matrimonii prælocuti*, writ of *aicl*, *besaie!*, *tresail!*, *cosinage*, or *nuper obiit*, writ of

to the reader of our ancient laws—leaving only six, or at the most, nine (including the three real and mixed) forms of action now known or used in the common law. The chief of these great and most wholesome reforms remains yet to be mentioned—that effected in the system of PLEADING by the NEW RULES (H. T. 4 Will. IV.) by which the remaining forms of action above-mentioned have been thoroughly righted, their details prodigiously abbreviated and simplified, and the system of pleading connected with them restored, in a great measure, to its pristine excellence.* The huge volume of the record is now, comparatively with its former state, shrunk into a sheet; and pleadings need no longer mystify the student, perplex the practitioner, distract the court, oppress the client, or disgust the public. The late Mr. Chitty, senior, for a long series of years the most distinguished pleader at the Bar, and author of the celebrated “Treatise on Pleading,” which has ever since its appearance stood alone in point of excellence, authority, and universal use, shortly after the New Rules of Pleading appeared, correctly stated the following to be their five principal objects. *First.* To compel each party in an action more explicitly to state his cause of action and ground of defence, so that his opponent may be better

waste, writ of partition, writ of disseisin, writ of quod ei de forceat, writ of covenant real, writ of warrantia charta, writ of curia claudenda, or writ per quare servitia, and no other action, real or mixed, (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action except a plaint for free bench, or dower, shall be brought after the 31st day of December, 1834.”

* In the reign of our English Justinian, Edward I., “the pleadings were short, nervous, and perspicuous; not intricate, verbose, and formal.” —4 *Blackstone's Comm.* p. 427.

informed what is the exact point intended to be established. *Secondly.* To diminish the number of counts, and the length and expense of pleading, and long records. *Thirdly.* To prevent the indiscriminate use of the plea of the general issue, which unjustly compels a plaintiff to prove *several facts*, and to incur the *risk* of failure on the trial upon points wholly foreign to the justice of the case; and not unfrequently *surprises* the plaintiff, on the trial, by the setting up a ground of defence not before communicated, or even hinted. *Fourthly.* To narrow the issue and limit the number of points to be tried; and thereby not only to diminish expense, but also the risk of failure in proof of comparatively immaterial allegations. *Lastly.* The great reduction of the present expense of trial incident to the subpœnaing and conveyance of witnesses to and from the place of trial, and maintaining them there.

To this it may be added that one excellent and most important tendency of these rules is, to strengthen the important line of demarcation between *the different provinces of the court and jury*, by separating the law from the fact, and at the earliest practicable stage of the proceedings.

Such are the leading features of change which the machinery of the common law has undergone within the last fifteen years; but it would be here out of place to specify in detail the miscellaneous emendations which have been, from time to time, during the same period, effected, sometimes by Statutes, but chiefly by Rules of court. It is, however, impossible to pass from this subject without specifying the valuable acts of—1 Will. IV., c. 7, for ‘the more **SPEEDY JUDGMENT and EXECUTION** in actions;’ 1 & 2 Will. IV., c. 58—for ‘enabling courts of law to give relief against **ADVERSE CLAIMS**, made upon persons having

no interest in the subject of such claims ;' and, above all, the great act of 3 & 4 Will. IV., c. 42—a model of legislation—" *For the further Amendment of the Law, and the better advancement of Justice ;*"* containing a multitude of admirable provisions, which during the last twelve years have been in constant operation with increasing advantage to the public, and also to the profession. Since the period when this last Act was passed (14th August, 1833), a great number of other Acts of Parliament and various Rules of Court have been respectively passed and promulgated, all conceived in the same liberal and enlightened spirit which animated those experienced and eminent persons, by whom these changes were originally contemplated and effected ; and which have placed the administration of every branch of the common law, upon—it may be said—quite a new basis. It must suffice for present purposes further to direct the student's attention particularly to the very recent statute (6 & 7 Vict., c. 85, passed on 22d August, 1843) "for improving the Law of Evidence," which (whatever may be thought of its *policy*) sweeps away at once an extensive and most difficult section of that branch of the law, by abolishing the incapacity from giving evidence, by *reason of crime or interest*—a fertile source, till then, of subtle and unsatisfactory distinctions and refinements—often, moreover, brought into play with a suddenness and publicity most unexpected and embarrassing to the young practitioner.

What, however, is the direct practical effect of these improvements in the machinery and working of the law? One, to the student, fraught equally with encouragement

* It was the first section of this statute which empowered the judges to frame the important pleading-rules before adverted to.

and warning. The removal of such a mass of preliminary and extrinsic difficulty, discloses to the eye of an attentive student, far earlier than was ever the case with his predecessors for centuries, and at a greatly reduced cost of disheartening labour, the scientific principles on which our system is based. If the *acquisition* of common law learning be on the one hand thus so considerably facilitated, the *use* of it, on the other hand, is attended with earlier and greater difficulties and responsibilities than heretofore.

Error will now be more quickly detected—more dangerous in its consequences to the young practitioner, than ever. As numerous obstacles have been removed, and many facilities afforded, so as not less to enable him to avoid, *than his clients to detect* error,—more will be expected from him : henceforth he will not be detained and harassed at the threshold, as heretofore, but may go on at once to the interior of the building. A single page of draft paper will suffice to certify his skill, or expose his inability. He can no longer, when engaged for the plaintiff, shelter himself beneath the slovenly and unscientific practice of shaping his case, in his ‘Declaration,’ in a dozen different ways, because he is unable either from want of inclination, time, or experience, to pitch at once upon the proper one, and stand or fall by it : nor, when concerned for the defence, escape, as heretofore, by simply pleading “the general issue,” from the responsibility of setting his client’s case upon its true legal grounds. He must now address himself, in either case, at once, and in the first instance, to the legal merits of his case, and *state those merits distinctly and conclusively upon the record*, at great peril in case of error : a plaintiff being limited to

one count for each distinct cause of action, and a defendant to one plea for each separate ground of defence.

Vigilant attention, close and accurate thought, must now, therefore, be invariably exercised: facts must be well weighed and sifted; and their real bearings ascertained and adjusted to legal forms, with prompt precision. A client will henceforth be able to see, in the twinkling of an eye, whether his pleader or barrister is incompetent—a mere pretender; and he must act accordingly.

The late Mr. Chitty, senior, has thus lucidly explained the origin of the custom of adopting several counts in one declaration. “As population and commerce, and their most inseparable incident, litigation, increased, and new intricacies and peculiarities in the facts as well as law arose, lawyers found themselves more pressed for time, and had less opportunity for due inquiries into, and consideration of, the facts and law affecting them, and less time to prepare and settle the pleadings; and hence the present practice commenced of framing the special count, and having several copies made, and then introducing small variations so as to meet the probable various shades of difference which usually occur in similar transactions—so endeavouring to state what it was conceived would, under one form of count or the other, meet the as yet unascertained evidence, and thereby avoid the trouble of particularly inquiring into the facts, and also the risk of variance upon the trial*. Thus, if a pleader were requested to draw ‘a declaration’ for a breach of promise of mar-

* In the sixth edition of his “Treatise on Pleading,” published in 1836, and accommodated to the new system, Mr. Chitty has inadvertently retained a sentence in one of the practical directions for drawing a Declaration for *Slander*, which bears decisive testimony to the character of the former

riage, he would, *without stopping to inquire into all the circumstances of the case*, introduce four or five counts—as, *first*, on a supposed promise to marry on a particular day, leaving the attorney to insert the actual day, or some day thereabouts; *secondly*, a promise to marry on request; *thirdly*, within a reasonable time; *fourthly*, to marry generally, showing as a breach, a request, and non-performance; and *fifthly*, a count on a general promise to marry, and stating as a breach the dispensation of any request by the defendant's marriage with some other person.”*

This was the ordinary, the every-day practice, till the recent alterations occurred. Could anything be at once more absurd and scandalous, than the pleader's fee depending upon the number of sheets over which he could spin out the pleadings, thus making his indolence and slovenliness the measure of his remuneration?

The recent extraordinary and unsatisfactory case of *O'Connell v. the Queen*, decided on appeal in the House of Lords, on the 4th September, 1844, and in which, notwithstanding the proved guilt of the parties, the whole of the proceedings were reversed and nullified on the ground that two out of eleven counts in an indictment for misdemeanor, on which a general judgment had been passed, were insufficient in law, may possibly tend to induce corresponding caution in drawing *criminal* pleadings, and entering verdicts and judgments upon them. “According to the present loose system,” says

system of pleading:—[“*Here state the words in as many different forms as possible*”] // [in order to meet every probable circumstance of the case.”]—
2 Chit. Plead., 442 (6th edit.)

* Concise View of Pl. pp. 18, 20.

Lord Campbell, in delivering his judgment, "the framer of an indictment having got one count good in law, goes on to draw others more and more vague and attenuated, and requiring less and less proof, till he involves the accused in the most perplexing generalities, and there is the greatest difficulty in knowing what is the charge to be repelled." Whether the reasons assigned for reversing this judgment, however plausible, be sound, and consistent with the spirit and object of the Criminal Law, may be questionable; but the decision in question cannot fail to be attended with important practical results, one way or another.

The great changes which the law had undergone shortly previous to the original publication of this work, have since been exceeded both in number and importance—with the like prospect for the future—owing to the extraordinary energy and activity of the legislature. During the session of Parliament which has just (1844) closed, several statutes have passed effecting changes of the greatest possible importance, especially in our monetary and commercial system, principally with a view to giving the public more effectual security against the continually increasing number of joint-stock banking and other companies, which are now subject to regulations of a very novel, stringent, and probably salutary character. The law of *Debtor and Creditor*, of *Bankruptcy and Insolvency*, is in a most unsettled and unsatisfactory state, owing to the repeated changes effected by the legislature within a very recent period, not allowing sufficient time for ascertaining the practical working of one alteration in the system before another is effected. This is earnestly to be deprecated. Such a state of things is undoubtedly

calculated to confound and dishearten students, and those intending to become such: who are apt to regard the attempt to acquire legal learning, at present, as little else than the idiot effort to build upon the shifting sands. Similar apprehensions, entertained at the time of effecting the extensive alterations in practice and pleading already alluded to, were thus allayed by the experienced counsel (the late Mr. Chitty) before quoted.

“ I regret to find that students, whether for the bar, or as special pleaders, or as attornies, have of late nearly suspended all study, upon the supposition, that whilst innovations in the law are so frequent, it would be useless one day to learn what must, perhaps, the next day be forgotten and effaced by a contrary regulation. Let me remind them that the REASONS and PRINCIPLES of law can NEVER change; and that now, the whole improved system of the law, whether as it regards practice or pleading, may be considered as nearly, if not entirely fixed, as it will be practised for many years; and that all students, therefore, should now return to their studies with redoubled energy*.” The practical good sense of these observations is worthy of the serious attention of the student of the present day, when apt to feel bewildered by the number and rapidity of the recent changes. The general *principles* of law are, indeed, wholly independent of the changes which, however great, are from time to time effected in the *machinery* and *working* of the law of the land. They are unaltered, because they are unalterable—pervading equally all sound systems of jurisprudence, in all ages and countries—being based upon truth and justice, and deduced from the

* Chitt. Conc. View of Pleading, Pref. p. v.

universal experience of mankind; nor can the acquisition and use of them fail to elevate and strengthen the mind, and qualify it to deal with, and master, the most important and practical difficulties in the conduct of human affairs. By their aid alone can existing inadequate and defective systems be safely and effectually adapted, or new ones wisely devised, to meet the altering exigencies of the times. Not to speak of our ancient rigid and complex system of Real Property law sternly, and, till recently, slowly accommodating itself to the necessities of modern society, it is impossible to gaze but with mingled astonishment and admiration at the comparatively recent structure of COMMERCIAL LAW, which—

‘ a fabric huge
Rose like an exhalation ’

at the bidding of those great legal architects who, from Lord Mansfield down to Lords Stowell, Eldon, Kenyon, Ellenborough, and Tenterden, have “magnified and made honourable” the administration of our laws: applying the pure and profound principles of legal science, with unrivalled sagacity and caution, to the sudden, novel, vast, perplexing exigencies of trade and commerce,—building up, by a series of solid and masterly judgments, within a few years’ time, a system which must ever be contemplated as one of the greatest triumphs of practical jurisprudence.

“Lord Mansfield,” said Mr. Justice Buller, in delivering judgment in the great case of *Lickbarrow v. Mason*, 2 Term Rep. 631, “may be truly said to be the founder of the commercial law of this country. We all know that, from his time, the great study has been to find out some certain general principles, which shall be known to all mankind, to rule not only one particular case, but to

serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding." Such was the generous and splendid eulogy upon that great man, pronounced by one who was thoroughly competent to appreciate his eminent judicial services, and also was himself one of the ablest judges who ever sat on the Bench.

It has been said that the mercantile law of England is, perhaps of all laws in the world, most completely the offspring of usage and convenience—the least shackled by legislative regulations; that while the legislature has not been slow to supply deficiencies and correct mistakes, it has hitherto fortunately abstained from any vexatious interference with arrangements dictated by that best of legislatures—experience.* Within the last year or two, however, the legislature has been very active in its interference with the mercantile law. So prodigious has been the development of the commercial enterprise and energy of the country, that it has become apparently too unwieldy to be any longer effectually regulated by the unassisted *lex mercatoria*—as may be seen, on adverting to that which has already been the subject of allusion, viz., the recent Acts, especially those of the last session, [1844,] for regulating private Banks, and JOINT STOCK Banking, Railway, and other Companies, and which subject those numerous, continually increasing, and gigantic combinations, to such a species and degree of controul, as could not have been effected by the energies of the common law

* Smith's Merc. Law, pp. 14, 15 (3rd ed.)

applicable to partnerships. The legislature, in thus interfering, cannot, however, properly be said to alter the general *lex mercatoria*, but rather to act in aid of it, in novel difficulties and unforeseen emergencies; concerning itself, not so much with its *principles*, but the machinery by which these principles are to be most conveniently and readily applied to the transactions of commerce. Complicated, indeed, unvarying, and apparently endless as are the combinations of facts occasioning mercantile litigation, the common-law—the law-merchant—applicable to them, and moulded and systematised by the great judicial efforts above adverted to, may be safely considered as, generally speaking, settled and precise.

There are comparatively speaking few important points now left open to discussion; * but there will, of course, always be occasion, not only for an exact knowledge of principles, but of the method of applying them in practice.

* One such question remains at this moment undecided, viz. whether the effect of *stoppage in transitu* be to rescind the contract between the buyer and the seller of the goods; or only to replace the seller in the position which he had occupied before parting with the possession of the goods, and which entitled him to hold the goods till the price should have been paid down. "There are difficulties," says Mr. Baron Parke, "attending each construction." On this point, in the latest case upon the subject, the late Lord Abinger, C.B., differed from the rest of the Court of Exchequer. See *Wentworth v. Outthwaite*, 10 Mee. & Welsb. 436. The student will find an able and interesting sketch of the origin and progress of the important doctrine of *stoppage in transitu*, given by Lord Abinger in *Gibson v. Carruthers*, 8 Mee. & Welsb. pp. 336 *et seq.* As we are upon this subject we will give an instance of such invincible difficulty in settling a rule of mercantile law as called forth the interference of the legislature. A bill of exchange was accepted in the following terms: "Accepted, payable at Sir J. Perring & Co., bankers, London." Now, was it necessary, in order to render the acceptor liable, to present this bill at Sir John Perring's banking house in London? The House of Lords (*Rowe v. Young*, 2 Brod. & Bing. 165) finally decided that it was; and therefore

It is quite impossible to convey to the non-professional reader any adequate idea of the difficulties suddenly and unexpectedly arising out of very simple and ordinary commercial transactions; and of the consequent prompt accuracy required in dealing with them. If the student and young practitioner do not devote early attention to this branch of the law, he will often appear to disadvantage on very embarrassing occasions; when, for instance, either in society, or elsewhere, as is often likely to be the case in this great commercial country, his opinion is suddenly asked by acute mercantile men, as to the legal consequences of *such and such* a particular act, which may be one of daily occurrence in business. He must, if unable to answer it, make a mortifying acknowledgment of his ignorance; or if he venture to risk a speculative answer, will probably be contradicted by some practical person present, and unable to defend his position, exhibiting a painful instance of rashness and incapacity. A case of this kind came under the author's notice very recently. A gentleman had lost, or been robbed of a 30*l.* note. He instantly sent to "*stop payment at the Bank,*" and, the question he asked was, 'whether the Bank was not thereupon bound to refuse payment of his 30*l.* note to any party presenting it?' There was a very young lawyer present; and being very young, he was very confident: so he answered the question off-hand, and got very far wrong indeed, and soon found it out somewhat unpleasantly! This important and

the Legislature interfered, and laid down a different rule: enacting (stat. 1 & 2 Geo. IV. c. 78) that it should not be necessary, in order to render the acceptor liable, to present a bill for payment at a particular place, unless the following were the words of the acceptance: "*Payable at [Sir J. P.'s Bank, London] only, and not otherwise, or elsewhere.*"

arduous branch of the profession will be found one of the earliest to which the young practitioner's attention will be called; and the great tests of his knowledge, not only in this, however, but every department of the law, are to be found in his acquaintance with the rules of PLEADING and EVIDENCE. Almost all the Common Law is divisible into these two. By the one you *shape*, by the other you *support* a case; and PRACTICE is but the settled mode of doing this. These three are inseparably connected together; they reciprocally act and re-act upon one another: and no person is competent to the most ordinary business, who is not well grounded in each. An ignorance of—a merely superficial acquaintance with—any of them, has often led to the most serious and mortifying dilemmas in open court, and is exceedingly dangerous, if not ruinous, to the reputation of the chamber practitioner. As the recently-remodelled system of pleading and evidence, now in a great measure developed and matured by a long course of valuable decisions by the Courts at Westminster, has rendered its acquisition easier, and use simpler, than were those of the former system, it is obvious that, as already observed, ignorance and incompetence are left with less of excuse, and fewer means of concealment; while industry, vigilance, and ability are more likely than ever to conduct their possessor to early success.

Thus, then, with every warning and encouragement before him, the student may at once address himself to the study of the law; and, if he chooses, make rapid advances towards the character of a practical lawyer.

A practical lawyer! A character contemned by some and despaired of by others: the former being those “gen-

teel vagabonds,"* who, swallowed up in idleness, conceit, and dissipation, nevertheless affect to be law-students!—the latter, those who, diligent and persevering, yet destitute of judicious tuition, egregiously over-estimate the difficulties to be overcome. It cannot be necessary to pause long, in order to vindicate the value and dignity of legal studies.† Against whom are they to be vindicated? What manner of men are they who presume to speak contemptuously of them? Who but those poor foxes that leer at grapes far out of their own reach—men frequently destitute both of talent and powers of application! We are not, however, wasting a word on the simpletons who abuse what they have not first even *attempted* to understand; but contemplating, rather, those who, lively and clever enough for lighter matters, do not carry weight of metal sufficient to make any serious impression on the study of the law. Healthy and bracing as is its pursuit, the intellect which engages in it must be one manly and vigorous.‡ A frivolous and volatile mind is knocked up in a twinkling: and then, probably, creeps off to abuse the

* Roger North, Disc. p. 4.

† "Melancholy and untrue is the picture which they draw of the study of law, who represent its prominent features to be those of subtlety and impudence, and of a labour dry and barren; rather would I compare it to a mountain, steep and toilsome on its first approaches, but easy and delightful in its superior ascent, and whose top is crowned with a rich and lasting verdure."—*Raithby, Study and Practice of the Law* (p. 6, 2d ed.) He might have added, in the fine lines of Goldsmith—

"Though clouds and darkness round its base be spread,
Eternal sunshine settles on its head."

‡ Listen to Sir William Jones describing his first impressions of legal studies:—"I have just begun to contemplate the stately edifice of the laws of England—the gathered wisdom of a thousand years—if you will allow me to parody a line of Pope. I do not see why the study of the law is called dry and unpleasant; and I very much suspect that it seems so to those

law as a "low and debasing pursuit—cramping—paralysing to all the powers of the mind!" *Eheu!* As well might a child, with its little wooden axe, attempt to clear a North American forest, in competition with the sturdy settler, felling away from day to day, from month to month, with stout arm and keen axe—as a mind, weak in constitution, or frail of purpose, undertake to wrestle with the stubborn difficulties of law.

A mind habituated to legal investigation is, necessarily, an acute and logical one: for its faculties are constantly exercised and sharpened by severe exercise. It has, indeed, been said, that the tendency of legal studies is to warp, contract, and impoverish the mind; seldom however has there been advanced a charge more thoughtless and unwarrantable. "Mr. Grenville," said Burke, "was bred to the law,

only who would think *any* study unpleasant, which required a great application of the mind, and exertion of the memory."

"Our profession," said the celebrated Mr. Dunning, afterwards Lord Ashburton, "is generally ridiculed as being dry and uninteresting; but a mind anxious for the discovery of truth and information, will be amply rewarded for the toil in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement."

"The science of jurisprudence," says Sir James Mackintosh, "is certainly the most honourable occupation of the understanding, because it is the most immediately subservient to the general safety and comfort."—And he proceeds to quote the language of Edmund Burke, who speaks of "the science of jurisprudence" as "the pride of the human intellect—a science which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of eternal justice, with the infinite variety of human concerns."

"The law is a science," says Blackstone, "which employs, in its theory, the noblest faculties of the soul, and exerts, in its practice, the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community."

The magnificent eulogium of Hooker (Eccl. Pol. Book I. *ad finem*) is too well known to require quotation.

which is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in those who are happily born, to open and liberalise the mind, *exactly in the same proportion.*" It is this latter cautious and measured expression which has been hastily made the foundation of many vague but violent accusations against our profession. If, to be sure, legal pursuits ALONE engross a man's attention throughout life, he will become, of course,—however great as a lawyer,—a *mere* lawyer: and what say you of a mere metaphysician?—a mere mathematician?—a mere linguist?—a mere physician?—a mere politician?—in short, a *mere* anything?

Trust us, however, if even this "mere" lawyer moves all his days like a horse in a mill, his round is a pretty extensive one! Consider, for a moment, what he must know, and what he has to do, if supposed to be in what is called "good practice at the Bar." He must be, to a very considerable extent, acquainted with the leading details of the arts and sciences,* of trade, commerce, and manufactures; of the sister professions; even of the amusements and accomplishments† of society—for in all of these, questions are incessantly arising which require the decision of a court of justice, for which pur-

* "The sparks of all sciences in the world," says Sir Henry Finch, "are taken up in the ashes of the law."—Book I. p. 6.

† A case was recently tried in the Court of Exchequer at Westminster, involving the claim to originality of a popular *song*—the witness-box and court being crowded with musical professors; one of whom, not a little discomposed the late Lord Abinger, by eagerly offering to explain his meaning, by playing a few bars on his *violin* which he had ready by him. Lord Abinger somewhat sternly refused to allow him to do so.

pose their most secret details must be laid bare before the eyes of counsel, who is expected to come into court quite *au fait* at them!—A knowledge of constitutional history, also, and the many important topics subsidiary to it, can hardly be dispensed with.—The barrister, moreover, who aspires after *eminence* should possess a keen insight into character, and strong powers of eliciting truth, detecting falsehood, and unravelling intricate tissues of sophistry. His mind should be in such a state of health and discipline as to render him capable of deep abstraction, of long and patient application, and, in short, give him effectual control over his well-tempered faculties, so that he may *concentrate* them upon any subject he chooses, passing rapidly from one to another of the most opposite character. Take a sample of the every-day employment of the higher class of counsel. His “opinion” is sought upon a ‘*case*,’ which discloses numerous commercial, or other, relations, deranged by the sudden death, marriage, bankruptcy, or separation of one of the parties concerned. Mark the apparently inextricable confusion into which extensive interests, rights, and liabilities are precipitated—cross accounts of many years to be mastered—probably an immense fortune at stake. Is it nothing, now, to answer such a case as this, with rapidity and skill—to adjust these conflicting claims with a precision which often satisfies the most clamorous contendants, preventing, perhaps, a long course of ruinous litigation? See the comprehensive grasp of thought—the accurate analysis—the rapid generalisation—the perfect mastery over details—the extensive research—the decision—exhibited on such occasions by the well-trained legal intellect! This is no highly-wrought picture: many of its features

will be found displayed, more or less, in the daily business of a well-employed chamber or court practitioner.—What, again, is to be said of the large emoluments derived, by such a man as we have been describing, from his honourable and responsible toils—the station he occupies, the influence he exerts, in society—the rank he attains both in the senate, and on the Bench? *

Surely, to enter and prosecute successfully such a profession as this, is worthy of great and early sacrifices on the part of the aspiring tyro,—should be an object of high and eager ambition. Can, then, too much pains be bestowed upon the facilitating his commencement? *CE N'EST QUE LE PREMIER PAS QUI COÛTE*, is as true in the legal as in the military campaign! An early disgust, if unfortunately contracted, often throws a hateful air over the whole pursuit. “The spectre that frights so, stands at the entrance; when that is put by, the walk will be easy, and, at last, pleasant; for every day’s work makes the next easier; and when the work becomes, as in time it will be, engaging, then the very exercise that was so very laborious will be rather a pleasure, and be at last an habitually agreeable diversion and entertainment of time; and if the understanding and consequences are rightly considered, reason itself will get the better of

* Lord Coke, in the preface to his second Report, gives an alphabetical list of “near two hundred great and noble families which had even in his time risen by the law,” and amongst them our chancellors. Old Fortescue (the chancellor of Henry VI.) talketh loftily in the same vein:—

“*Mihi quoque non minimi numeris Divini censetur esse pensandum, quòd ex judicum sobole, plures de proceribus et magnatibus regni hucusque prodierunt, quàm de aliquo alio statu hominum regni qui se Prudentiâ et Industriâ propriâ opulentos, inclytos, nobilesque, fecerunt.*”—*De Laudibus Leg. Ang. cap. LI.*

aversion : for what can a man do better than that which he knows is best for him ? ” *

The present work is pre-supposed to be in the hands of one who is *downright in earnest* in entering into the legal profession,—who will not coquet with it, or skim, swallow-like, over its surface only. He who is inclined to act *thus*, will find this work a very sad and tiresome affair ; he had better exchange it for some of the light literature of the day. Let him rest assured that there is no royal road to the knowledge of law, any more than to that of the mathematics. No indolent luxurious stranger can saunter into the legal garden, and pluck the fruit which has been reared by the assiduity and skill of another,—for “ *whoso KEEPETH the fig-tree shall eat the fruit thereof †.* ” He cannot purchase it at any price ; but must himself prepare the soil, plant the tree, and tend it to maturity.

The author cannot close this first section of his labours without adding two general observations, which it may be useful for the practical reader to carry along with him. They relate to the *peculiar* difficulties besetting the usual mode of commencing the legal profession ; and to the principle of that system of study recommended in the ensuing pages.

It is a trite remark, that the entrance upon *any* study is generally very irksome and discouraging. This is eminently the case with legal studies as at present prosecuted ; and its preliminary difficulties have two special sources : first, in the nature and number of its *TECHNICAL TERMS*—“its thousand technical intricacies.” ‡ The poor

* Roger North, Disc. p. 6.

† Prov. xxvii. 18.

‡ *Raishby*, p. 50-1.

tyro can stir scarce a step, without encountering expressions either altogether new, or used in a sense totally different from the one to which he has been accustomed. True, he may have at hand both a law dictionary and an able tutor; but he is wearied by the incessant necessity of appealing to them, and distracted by the minuteness and multiplicity of the information they afford. He is apt to get irritated and desponding; with "the vast, the unbounded prospect," lying before him, he feels that he is making not an inch of sensible progress. He finds it impossible to recollect distinctly a tithe of what he is told; and yet is aware that this distinctness is a capital requisite—a *sine quâ non*, in legal matters; that a single half-understood, or mis-understood expression, will carry after it a film of indistinctness which will obscure every subject in which that term is used. "The task of unlearning the import of words the young student is already acquainted with," observes Locke, "and affixing to those familiar terms new and precise ideas, is one of no small difficulty, and requires not only the strictest attention, but constant care and frequent repetition." * This is specially true of legal terms. Mr. Ritso has forcibly observed, "that the reason we have so much seeming obscurity to contend with, at least upon our commencement of the study of the law, is, not the want of evidence in things, but the defect of preparation in ourselves, and more particularly our not being *conversant* in the meaning of the terms of art, which experience has shown to be necessary in this branch of learning, for the sake of cer-

* If the student be not already familiar with it, he is recommended to peruse with attention Locke's "Remarks on the Abuse and Imperfections of Words, with their Remedies."—Book III., c. 10, 11.

tainty, brevity, and convenient precision.” — “ Having succeeded in distinctly and fairly understanding *the terms of art*, we are enabled to perceive in a short time, and with very little labour, that the various doctrines and rules of pleading are of a nature to be demonstrated upon the principles upon which they were originally suggested, of plain reason, and common intendment.” * It is of the highest importance to call the young lawyer’s attention, at the very outset, to this, one of his earliest enemies—the grand stumbling-stone by which many an eager youth has been tripped up at starting, and gone halting through a great portion, if not the whole remainder of his journey. The necessary suggestions on this subject will be found detailed in a subsequent part of the work.

The other source of preliminary difficulty arises in those cases where a student,—unwisely (in the author’s opinion,) begins his career by entering the chambers of a gentleman in extensive practice—out of the necessity for *rapid transition* from one topic and subject matter of business to another, by which professional practice is characterised ; rendering it nearly impossible for the pupil to pursue, with effect, a connected and systematic course of study, without losing the opportunity of seeing that business, to see which he has paid so dearly. The varied nature and urgency of actual business, require the student to be perpetually plunging into new subjects, with the leading details of which he has not time to familiarise himself. This is apt to induce a hasty scrambling habit, against which he cannot be too vigilantly on his guard at the outset of his career. There is in the author’s opinion only one way of meeting this difficulty — by

* Introduction to the Science of the Law (1815), p. 184.

placing himself at once under the superintendence of a competent teacher who is in *moderate* practice: one whose tact and experience will keep business and *systematic reading* ancillary to each other; who will chalk out a proper line of study, enforce it by his personal interference, and illustrate it by actual practice. This will be found the only safe, quick, practical introduction to the profession. To stimulate the flagging energies, and temper the undue ardour of the student, is indeed a difficult and responsible task, fit to be undertaken by those only who have at once the love, the gift, and the opportunities of teaching: and of such there is no inconsiderable number thus actively and successfully engaged; and anxious inquiries should be made after such persons. Let it not, then, be imagined that this publication is intended to supersede the necessity of studying and that, *totis viribus*, under a pleader, or barrister, or both. Nothing *can* supersede it; nothing compensate for the want of it, as is generally the mortifying discovery, when it is too late to remedy the evil. The present work aspires only to be the student's guide to the selection of the profession—his *vade-mecum*, during the momentous period of his pupillage; suggesting to him some things which he might possibly otherwise have not known, and recalling some which he may have forgotten.

The only other topic remaining, is an intimation of the mode suggested by the author of teaching the law. Whilst most of those who have undertaken to advise on this subject have chosen the *synthetic*, the author would prefer the *analytic* method of learning law—or rather that combination of the two which has been already hinted at, and will be more fully explained in its

proper place hereafter. What is meant, is—that instead of the student's attempting to acquire, in the first instance, a systematic knowledge of the abstract principles and rules of law applicable to particular cases, he will find it infinitely more convenient and instructive to address himself rather to the individual cases which are governed by those rules and principles—under the superintendence of one who can at once facilitate to him the mode of mastering the particular combinations of facts, and of applying to them the rules and principles which govern them. He will be thus more likely to retain the knowledge he acquires; *combinations of facts will speedily begin to suggest to him the principles on which their true legal consequences are to be adjusted*: he will be at one and the same time acquiring a knowledge of the law, and of the practical mode of *finding* and using it. Without here pursuing the subject further, however, the author contents himself with citing a passage corroborative of his views, from the "Elements of Logic," by Dr. Whateley—the present Archbishop of Dublin.

"There is a difficulty which exists more or less in all abstract pursuits; though it is, perhaps, more felt in this, (*i. e.* logic, for which we may well substitute *law*,) and often occasions it to be rejected by beginners, as dry and tedious; *viz., the difficulty of perceiving to what ultimate end—to what practical or interesting application, the abstract principles lead, which are first laid before the student*; so that he will often have to work his way patiently through the most laborious part of the system, before he can obtain any clear idea of the drift and intention of it.

"This complaint has often been made by chemical students, who are wearied with descriptions of oxygen,

hydrogen, and other invisible elements, before they have any knowledge of such bodies as commonly present themselves to the senses. And, accordingly, some teachers of chemistry obviate, in a great degree, this objection, by adopting the *analytical* instead of the *synthetical* mode of procedure, when they are first introducing the subject to beginners; *i. e.* instead of synthetically enumerating the elementary substances, proceeding next to the simplest combination of these—and concluding with those more complex substances which are of the most common occurrence, they begin by analysing these last, and resolving them step by step into their primitive elements; thus at once presenting the subject in an interesting point of view, and clearly setting forth the object of it. The synthetical form of teaching is indeed sufficiently interesting *to one who has made considerable progress in any study*; and being more concise, regular, and systematic, is the form in which our knowledge naturally arranges itself in the mind, and is retained by the memory: but the analytical is the more interesting, easy, and natural introduction; as being the form in which the first invention or discovery of any kind of system must originally have taken place.”*

The author begs to refer his readers to the chapters hereafter appropriated to the development of these principles, in their application to the study of the law; and, in the mean time, pauses to address the adventurous, but perhaps hesitating, student, in the inspiring words of the poet—

“ — quæ timido quoque possent addere mentem :

“ ‘ I, bone, quò virtus tua te vocat : i, pede fausto

“ ‘ Grandia laturus meritorum præmia ! ’ ”†

* Elements of Logic, pp. 15—17, (3rd edit.) † Hor. Epist. lib. ii. ep. 2, 36, 38.

SUPPLEMENTAL NOTE

CONCERNING THE

EDUCATION FOR THE BAR IN ENGLAND, IRELAND, SCOTLAND,
FRANCE, AND AMERICA.

I. It may have been gathered from the foregoing pages, that no preliminary course of study, or examination into legal proficiency, is required from candidates for admission to the ENGLISH Bar. Such is the case also with the IRISH Bar. They are not bound to attend any lectures at either of the Universities or elsewhere. Whether this might advantageously be ordered otherwise, is a difficult question. Some persons of judgment and experience are of opinion, that an examination into the fitness, in respect of legal knowledge, of law students, is as requisite as are the examinations prescribed to candidates for admission into holy orders, and into the medical profession. Without expressing any opinion as to the expediency of adopting such a course, we content ourselves with saying, that numerous practical difficulties will suggest themselves to all experienced lawyers.

II. Advocates in SCOTLAND (of whom there are numerically between 400 and 500, but not more than 100 actually engaged in practice) are not required to follow any course of preliminary study, but must undergo certain probationary trials. In order to be admitted a member of the Faculty, the applicant for admission presents a petition to the Court, stating his wish to become an advocate, and intimating his readiness to undergo a trial of his skill. This application is referred by the Court to the Dean of the Faculty; who remits the applicant to the private examiners, (being a certain number of the members of the body appointed annually by the Dean to discharge that duty) to make trial of his fitness. The candidate then appears before these examiners, and on satisfying them that he is twenty years of age, and that he has paid the usual fees, he is taken on trial, and examined as to his skill in the *Civil or Roman*

law. He is expected to be familiar with the four books of the Institutes of Justinian, in which he is examined in English, and also to be able to translate a passage in the Pandects, *ad aperturam libri*. This is called the private examination in civil law. If he give satisfaction to the examiners, they subscribe an attestation to that effect, and he must then allow a complete year to elapse ; after which he is in like manner examined as to his skill *in the law of Scotland*. Having passed that trial he prepares a Latin thesis on a title in the Pandects, which he defends publicly before the Faculty. The form to which this ceremony has dwindled, is thus gone through. The candidate selects three of his friends, members of the Bar, to act as his public examiners, and provides each of them with an apparent objection to one of the three *Annexa*, as they are called, or propositions appended to the end of his thesis. These objections are accordingly stated by the examiners, and answered by the candidate, who supports each *annexum* by a reference to some passage in the "Corpus Juris." A ballot-box then goes round among the members of Faculty present, including the examiners and the Dean of Faculty, or his deputy, who occupies the chair. The candidate is then admitted ; puts on his gown ; and then appears before the Court, where the oath *de fidei administratione* is administered to him ; and he also swears to abjure the Pretender. An advocate thus admitted is entitled to plead in every Court in Scotland, civil, ecclesiastical, or criminal, superior or inferior, unless when debarred by special statute (as in the Small Debts Act) ; and also before the House of Lords in Scotch Appeals. Advocates are answerable for their official conduct to the Court of Session. The fees of admission, stamp, &c., amount to about 300*l*. Unlike students for the Bar, the apprentices of Writers to the Signet (i.e., the highest class of solicitors) are obliged to attend, in addition to several preparatory classes in the University of Edinburgh, four courses of law ; in the three classes of civil law, Scotch law, and conveyancing.—"As the profession of an advocate is esteemed," says the *Encyclopædia Britannica*, "the genteelst in Scotland, many gentlemen of fortune become members of the Faculty without any intention of practising at the Bar. This circumstance greatly increases their number, and gives dignity to the profession." The author is able to confirm this statement from his own personal observation. Its Bar is an honour to Scotland, in respect of the superior accomplishments, the professional acquirements, and the high tone of gentlemanly feeling, which characterise its members.

The Writers to the Signet—it may be added—are also a highly

educated and superior class of men, often belonging to the best families in Scotland. They perform certain *official* duties of importance, and are not, it is believed, ineligible even for the Bench.

III. The law student in FRANCE, before being admitted to the rank of Advocate, is required to go through a three years' course of study at the Law Schools at Paris (*Écoles du Droit*), where there are professors of Civil Law, Commercial Law, the Law of *Procédure*, and of Roman Law; which last, however, appears to be no longer a *necessary* basis of instruction. "As to the study of the law of the state (*la loi de l'état*)," observes M. Berville, in the "*Profession d'Avocat*," "which regulates the duties of citizens towards society, which guarantees their rights, which determines the organisation and competency of the social powers—apparently it has not been considered worth while to have a professor for *them*. You will not hear a word of *them* in your four years of study*." The course of study may be prolonged according to the discretion of the *Conseil de Discipline*, which consists of a select body of the most eminent advocates. The following somewhat stringent oath is administered to the young French advocate:—

"Je jure d'être fidèle au Roi et d'obéir à la Charte constitutionnelle, de ne rien dire ou publier, comme défenseur ou conseil, de contraire aux lois, aux réglemens, aux bonnes mœurs, à la sûreté de l'Etat et à la paix publique, et de ne jamais m'écarter du respect dû aux tribunaux et aux autorités publiques."

English and Irish Counsel, also, on being called to the Bar, are required to take oaths—those of Allegiance and Supremacy; which are administered twice,—in the first instance, on the evening of being called, before the assembled Benchers in their Parliament chamber; and on the ensuing morning before one of the Judges at Westminster, in open court. The oath administered to Roman Catholic Barristers is that prescribed by statute 10 Geo. IV., c. 7, s. 2.—The oath taken by the French Advocates certainly appears calculated to occasion embarrassment to one who wishes conscientiously to observe it upon all occasions. It is believed that there have been instances of such difficulty being experienced—and that the extent of freedom of speech and of action allowed to one who had taken this oath, has been very recently the subject of serious discussion in France.

IV. IN AMERICA the division of advocates into attornies and counsel

* *Profession d'Avocat*, pp. 370-1, by M. Dupin aîné, and others, Paris, 1832.

has been adopted from the prevailing usage in England, and the two degrees are kept strictly separate in the Supreme Court of the United States. In all the other courts, however, of the United States, as well as in the courts of New York and the other States, the same person can be admitted to the two degrees of attorney and counsel, and exercise the powers of both *. To our English notions few things can appear more objectionable and unseemly than this confusion of incompatible characters, qualifications, and duties.—The author is, unfortunately, not able, before this work goes to press, to ascertain whether any previous course of study, or any examination, is requisite in America, before gentlemen are admitted to practise at the Bar. He believes that such is not the case. In Harvard University, however, there is a *LAW SCHOOL*, which confers academical degrees upon its successful students; and it is believed that many of the students for the Bar attend this school. Professor Story (one of the Justices of the Supreme Court of the United States, whose elaborate, comprehensive, and accurate legal publications have justly earned him a high reputation in this country), in the character of Dane Professor of Law in the University, equally shares the active labours of education with Mr. Greenleaf, the “Royall” Professor of Law; the latter gentleman having the immediate direction and superintendence of the Law School. He is the author of an excellent treatise on the “*Law of Evidence*,” of an elementary character, which is being prepared for the use of English students and practitioners, by an able member of the English Bar. The outline of the *course of legal education*, together with the works recommended to students, under the sanction of such able and experienced teachers, extracted from a sort of university calendar, for Harvard University, published for the year 1843-4, will be found in the Appendix to this work, and is worthy of being referred to and considered by the student.

We cannot quit the subject of the administration of the law in America, without noticing one surprising and almost incredible absurdity perpetrated by several of the State constitutions: we mean that which compels the retirement of a judge, at a certain fixed age—without the least regard to his physical, moral, and intellectual fitness to continue in the office!—Nay, in spite of his being in the full maturity and plenitude of his powers, the Constitution of New York actually compels the retirement of a judge on attaining his *SIXTIETH* year! And what has been the result? The loss of incomparably the ablest judge hitherto produced in America—Mr. Chancellor Kent, several years ago—and who

* Kent's Commentaries on American Law, pp. 306-7, 4th edition.

is "at this moment in the full possession of his extraordinary powers." * Such a proposition would be regarded in England simply as an evidence of *insanity* in him who brought it forward. Look at the English Bench, as now filled, and in former times. Such a preposterous rule as that tolerated in America, would have deprived this country for ages, of its most resplendent judicial ornaments. Twenty years of the great Lord Mansfield's judicial life would have been sacrificed: and look at the case of Lord Lyndhurst—the late Lord Abinger—Lord Denman—Sir Nicholas Tindal—The Vice-Chancellor of England—and others who might be named! We may indeed say—addressing those guilty of such absurdity—

—— pudet hæc opprobria vobis—
Et dici potuisse, et non potuisse refelli!

* Story on the Constitution, vol. iii., p. 487, note.

CHAPTER II.

ON THE CHOICE OF THE LEGAL PROFESSION.

STUDENT, throbbing with the honourable desire of distinction! have you REFLECTED upon the step you are taking, in entering into the brilliant struggles of the Bar? Have you endeavoured to form anything like a distinct idea of the kind of life that awaits you, of the

“long, the rough, the weary road”

that must be traversed, before you can stand beside yon bright figures which, glittering in the distance, may have so dazzled your young eye? Have you considered—have you heard, of their severe labours? Bear with him who thus begs of you to pause for a moment, and ponder your prospects: who seeks, in all faithfulness, not to discourage you—not to damp your glowing energies, but to guide them; to sober and strengthen you, while “plodding your way through the heavy road, to the high places of the profession!”

The prizes in the legal lottery—if one may use such an expression—the distinctions open to competition among the members of the Bar, are, as has been already intimated, unquestionably far more numerous, valuable, and dazzling, than are afforded by any other profession. Two Lord Chancellors in England and Ireland; the numerous Equity Judges and Common-Law Judges of the superior

Courts; the Ecclesiastical Judges; the Indian Judges, Recorders, Registrars, &c. &c., all with splendid salaries; the colonial Judges; the Recorders of the English boroughs; Stipendiary Magistrates; between eighty and ninety Revising Barristers, (with two hundred guineas each), annually bestowed by the Judges, chiefly, too, upon the junior members of the Bar* (regard, however, being had to individual fitness in respect of experience, learning, and character, for such responsible public duties), Bankruptcy, Insolvency, and Lunacy Commissioners; Masters in Chancery, and a great number of other lucrative and important, permanent and temporary appointments conferred upon Barristers:—all these justly invest the profession of the Bar with a peculiar attractiveness to the eye of ambitious talent; for every one of the above glittering series of offices and appointments is really and unquestionably within the reach of even the humblest candidate for success at the Bar. And to this must be added the splendid incomes made by the more successful private practitioners at the Bar, and the great number of ample and comfortable incomes—some of them without their possessors being ever heard of in public—derived from practice by those who

* The Revising Barristers for the county and the boroughs in Middlesex, and the Cities of London and Westminster, must be appointed by the Lord Chief Justice of the Queen's Bench, in the months of July and August; and all the others must be appointed by the Judges during the Summer circuits (stat. 6 & 7 Vict. c. 18, s. 28): from which it may be inferred that the legislature intended the selection to be made from the members of the respective circuits in which the boroughs and counties to be revised are situated.—Occasionally, however, the Judges have appointed those who were utter strangers to the circuit, and members of the Equity bar. Additional Barristers may be appointed when necessary (s. 29.) Any Barrister of *three years' standing* is eligible (s. 28.)

are only moderately successful in obtaining it. While thus, however, is exhibited distinctly and frankly the bright side of the picture, it would be cruelly delusive to conceal the dark side. We shall content ourselves, for the present, however, with one disadvantageous and very disheartening circumstance, viz. the great difficulty of getting anything like a fair and real "*start*" in the profession; arising from (among several permanent causes which cannot be here specified) *the vast increase in the number of competitors** within the last fifteen or twenty years. During that period, moreover, by no means an inconsiderable proportion of the Bar has been, and continues to be, derived from those who have relatives and connections among the other branches of the profession (that of Attornies and Solicitors), in many cases from those who have been themselves not barely educated to be Attornies and Solicitors, but have actually practised as such, and who, undoubtedly, when possessed of the requisite *personal* qualifications for success (of which there exist several encouraging instances), come armed with immense advantages over their less fortunate rivals. This very circumstance, however, should suggest an important practical reflection to one of this class meditating coming to the Bar; viz. its natural tendency *so to distribute* "connection" amongst individual objects of favour, as, while terribly increasing the difficulties of those who *cannot* obtain such assistance, seriously to diminish its ultimate efficacy to those who *can*. The result of the whole is, to augment the number of those who make little

* From the short table which is given at page 1, the reader will see that between the years 1833 and 1844 the number of Barristers has increased from eleven hundred and thirty, to TWO THOUSAND FOUR HUNDRED AND EIGHTY-FOUR !

incomes from unimportant *favour-business*, and can never get beyond it; and to prolong the struggles, to retard the progress towards *decided success*, towards *eminence*, of the great majority of the members of the Bar; wearing out with that *hope deferred which maketh sick the heart* those who, from deficient health, pecuniary resources, physical or mental energy or perseverance, faint by the way, and are left behind defeated, neglected, heart-broken, forgotten. But however long and arduous the struggle, while moderate merit will *insure* only moderate success, nothing but eminent merit can insure—and that it *will insure*—distinction and greatness.

Bearing in mind these and many other important considerations which will be suggested by a perusal of this work,—when the consequences of failure are so dismal, of success so dazzling, is it not obvious what anxious inquiry, what grave deliberation should precede the adoption of the profession of the Bar; especially when one adverts to the circumstance that this is a profession almost universally entered at such a period of life as admits of the exercise of a sound and manly judgment in making choice of the Bar? Let us at once, then, to the task.—Listen to the advice given by a quaint and sagacious old lawyer, so long ago as 1675. Despite its straight-laced pedantic form, it is worth giving at length.*

“Many, applying themselves to the study of the law, without due and serious consideration of the qualifications

* The sight of the Latin quotations with which the following passage is so plentifully seasoned, reminds one of Sir Thomas Browne's remark [almost equally applicable, by the way, to his own writings], “and, indeed, if elegancie still proceedeth, and English pens maintain that stream we have of late observed to flow from many, we shall, within few years [he was writing in 1646] be faine to learn *Latin* to understand *English*, and a work will prove of equal facility in either.” *Pseud. Epidem.—Epist. to the Reader.*

such a student ought to be furnished withal, have missed of that content and delight which is treasured therein; and instead thereof, have met with trouble and vexation of spirit, judging it to be *studii, non sui morbum*, an inseparable incident to this study: thinking it unattainable and full of difficulty, because they are not qualified for the same; according to that of Seneca, *Multis rebus inest magnitudo, non ex natura sua, sed ex debilitate nostra*. And certainly it can be no otherwise, where any undertake a profession *invita Minerva* (as we say), when both their genius and qualifications check them in their choice. For those things delight every man, and those only which are *Οικεία τῇ φύσει*, as the philosopher speaks, suitably fitted and accommodated to their genius and frame of nature.

“That our student therefore may find the pleasure thereof answerable to his expectation, this study must be his choice upon mature deliberation; following Seneca’s advice herein, *Considerandum est utrum natura tua agendis rebus, an otioso studio contemplationique aptior sit*. And this choice is matter of great difficulty, wherein a man carrieth himself diversely, and wherein he shall find himself hindered by several considerations; which draw him into divers parts, and many times hurt and hinder one another. Some herein are happier than others: who, by the goodness and felicity of nature, have known both speedily and easily how to choose; and by a certain good hap (or rather Providence), without any great deliberation, are as it were wholly *carried* into that course of life which does best befit them. Others not so fortunate, who failing *ipso limine*, in the very entrance, and wanting the spirit or industry to know themselves, and in a good hour to be re-advised how they might cunningly withdraw their stake in the beginning of the game, are in such sort engaged, that they

cannot without shame recal themselves from that which they have as wilfully as inconsiderately undertaken ; but endure much trouble in persisting therein, and so are constrained to lead a tedious and wearisome life, full of discontent and repentance ; and, which is worst of all, lose both time and labour, and spend their goods and beat their brains, without any either profit or delight ; and after a long time spent therein, know not how to give a reason why they are rather for this or any other calling, except because their ancestor professed the same, or that they were unawares carried into it, which made Seneca say, *Pauci sunt qui consilio se suaque disponunt, ceteri eorum more qui fluminibus innatant, non eunt, sed feruntur*. Whereas every science requires a special and particular wit and habilities, according to which every man ought to steer his course. Hippocrates saith, that man's wit holdeth the like proportion with sciences, as the earth doth with seed ; which though of herself she be fruitful and fat, yet it behoves to use advisement to what sort of seed her natural disposition inclineth ; for every sort of earth cannot without distinction produce every sort of seed : answerable to that of the poet,

*Nec tellus eadem parit omnia, vitibus illa
Convenit, hæc oleis, hic bene farra virent.*

This choice being so difficult, that our student may not herein miscarry, *nec quicquam sequi quod assequi nequeat*, he must make a strict inquiry into these two things—his nature, and the nature of the study. That his nature (that is, his capacity), temperature, and whatsoever he excellet in, be answerable to the study. *Id quemque decet quod est suum maxime sic faciendum est, ut contra*

naturam universum nil contendamus, eâ servatâ, propriam sequamur."*

A mischoice of the legal profession, of which every Term, it is to be feared, affords but too many instances, is attended with peculiarly serious and mortifying circumstances. The keen competition—the too frequently bitter and unfriendly rivalry † to be encountered,—the publicity of the struggle,—the obstacles impeding the acquisition of the necessary knowledge,—the harassing nature of business to the successful practitioner, and of responsibility with scarce any intermission or alleviation: these are a few of the considerations which imperiously call for the most searching self-examination, before such a 'warfare is undertaken.' For of what avail is the most perfect intellectual aptitude, if united to physical incompetency, of which many mournful instances have fallen under the author's personal notice! What, on the other hand, are a melodious voice, a commanding appearance, an iron constitution—

——"robur et æs triplex,
Circa pectus,"—

if not conjoined with intellectual adequacy? Or shining talents, if not of the *kind* practically suitable for our profession? And let it be asked finally, what signifies the combination of all mental and bodily accomplishments, if not supported, attempered, and ennobled by those high *moral* qualities—that gravity, energy, steadfastness, and

* *Studii Legis Ratio*. By W. P. [i. e., William Phillips], pp. 1—5.

† A painful remark, this, to make; but Mr. Raithby expresses himself much more pointedly: "The student," he says [pp. 61, 2], "will have to contend with men, who, so far from having any motive to spare him, will, perhaps, consider it as perfectly justifiable to expose his ignorance, or deride his imbecility."

integrity, purified and exalted by genuine RELIGION, without which all other qualifications are as naught !

It is taken for granted, that the student, as he will not adopt the law capriciously, so will neither suffer himself to be *forced* into it by the caprice or tyranny of others *. Should this, however, unhappily be the case, the parent will have placed his son in a situation of unspeakable misery for life, or perhaps its greater and more valuable portion ; and is fearfully answerable for all the vexation

* How forcibly speaks old Philips !—

“ *Ecce inclinandum*, quoth Seneca, *quo te vis ingenii desert*. Without this, whosoever attempts this, or any other study or profession whatsoever, doth but labour in vain ; and if the reason hereof be but considered, here is no cause for wonder ; for the same philosopher tells us that *coacta ingenia male respondent, et reluctantæ naturæ, irritus labor est*. This was the reason that Isocrates, laying hands on Ephorus, drew him from the court of judicature, knowing him to be inclined to, and fitter for, another employment. *Isocrates Ephoram infectâ manu subduxit, utiliore componendis monumentis historiarum ratus*. And for any to attempt this study *invited Minerva*, as they say, is plain folly ; nor can it be imagined that any man with a loathing mind and forced industry, can compass such a laborious study, not being able to take any delight therein. Whatsoever such a man doth, is but to plunge himself the deeper in difficulties ; whereas, on the other side, a propensity to the study renders the work less tedious, the pleasure that the student finds therein, far exceeding any trouble or vexation whatsoever. And this delight in the study makes the student thoroughly to understand and apprehend the same ; and it doth not only dilate the spirits, but doth also quicken the memory, according to the saying, *Quæ magna æstimamus memoria infigimus*. In a word, without inclination to a study, there can be neither pleasure nor proficiency therein.”—*Stu. Leg. Ra.* 51, 52.

And Lord Bacon—

“ Men ought to take an impartial view of their own abilities and virtues ; and again, of their wants and impediments, accounting these with the most, and those other with the least. * * How their nature sorteth with professions and courses of life, and *accordingly* to make election, if they be free ; and, if engaged, to make the *departure at the first opportunity*, as we see was done by Duke Valentine, that was designed by his father to a sacerdotal profession, but quitted it soon after, in regard to his parts and inclination. And to consider how they sort with those whom they are like to have for competitors and concurrents,” &c. &c.—*An Advancement of Learning*.

and disappointment which sour the temper and benumb the heart, and too generally drive their victim into ruinous dissipation, inspiring him with unfilial anticipations of the period when he may be enabled to "fly like a bird from the snare." Why, foolishly ambitious and mistaken parent, or other relative, will you act thus? Why stick a verdant shoot into an ungenial soil?

Well, then, student, duly meditating upon this most momentous subject, are you really sufficient for these things? Let us first inquire what manner of man you are **PHYSICALLY**. Can you bear the long confinement and intense application required for the successful study—to say nothing of the practice—of the law? The question is not whether, with all the confidence, resolution, and enthusiasm of genius, you can go through this preliminary struggle, but, can you go through it *safely—unscathed*—without having ultimately to acknowledge that *here* your health received a mortal shock? What if, while one hand is sowing in your mind the rich seeds of wisdom, the other is scattering those of disease and death in your constitution?—If you cannot, then, answer this first question satisfactorily, can you yet say whether your pecuniary circumstances will enable you (to use a vulgar but significant phrase) to '*take it easily*,' to mitigate the severity, by extending the period, of your studies? If these questions cannot be answered affirmatively, either by you or your medical adviser, you must really pause, painful and disheartening as it may be, for life is at stake! Alas, what is the use of your being "called to the bar," and to the grave, at the same time?—of completing your library—your copious note-books, and choice 'precedents'—only to give them to others, in the

faltering accents, the bitter moments, of a premature death-bed !

You will observe, that whichever branch of the profession you select, this arduous course of study must be undergone ; and that if you really intend to earn the character of a practical lawyer—to pretend to but moderate fitness for business, in order that you may acquire a livelihood by it—there is no department of the law, not even the calmest and obscurest, the practice of which will not require much confinement, labour, and anxiety. There are, however, many equal to chamber practice, whom the turbulent excitement and exertion of court practice would destroy. In the comparatively tranquil occupations of a conveyancer, special pleader, and even equity draftsman, a weak constitution may be nursed, and its energies husbanded, for very many years. The usual hours of attendance here are from ten to five o'clock ; frequently, however, till a late period in the evening ; and this for at least nine months in the year. Nor is this all. Business will exact, especially during the early years of the practitioner, before he has acquired the calm confidence and dexterity which long practice alone can confer, or warrant—from morning to night, a degree of anxious absorbing attention, which cannot fail to try some constitutions quite as severely as others would suffer by court practice. There are many to whom such close confinement, and unremitting mental exertion, are the short sure avenue to the grave ; and folly, indeed, must it be to adopt hastily that line of life which exacts both of them from the very beginning. Let not the student, however, be disheartened, or fall into a fanciful nervous humour, which alone is sufficient to disable him for *any* pursuit. Though he may have good reason

to apprehend that his health is none of the strongest, a judicious attention to it—method and moderation both in living and studying—avoiding scenes of dissipation, as he would fly from a place swarming with deadly serpents—will carry him through many a storm, into the repose and security—“the chair-days of most reverend age.” It is impossible to imagine any calling in life in which early regularity and attention to health are of such vast consequence as in the law. Nothing can sustain the enormous pressure of an established and extensive practice, in more advanced life, but a constitution which (even strong originally) has been gradually strengthened and case-hardened by early and systematic care. Of the truth of this observation, alas ! how numerous and melancholy have been the illustrations within the last three or four years !

The student must make up his mind, in adopting chamber practice, to abandon many social pleasures and intervals of relaxation, at least during the day ; for at his chambers he *must* be found during business hours, or business will not find *him* ; business must be got through in the usual and appointed times, or clients will soon desert him. From an extensive acquaintance, therefore, with its innumerable dissipating incidents, he must resolutely retreat. If he cannot make up his mind to *this*, and yet will persist in entering the profession, let him do so : he will have to repent at leisure—when he finds himself, poor soul ! become one of those scarecrows which are pointed out by experienced friends, to warn off promising students from improper courses !

There are some habits and qualities absolutely indispensable to success in these less stirring, but lucrative and important departments of the law. To the clear head and

close thought which are essential to them all, the chamber-practitioner must unite a deep meditative humour, great patience in going through matters of long, and often tiresome details, and rigorous accuracy in *minutiae*,—besides the incessant manual labour, and vigilant superintendence, required for ‘drawing’ and ‘settling’ pleadings and conveyances: but the more particular consideration of all these matters will be found in its proper place.* Perhaps, however, the ambitious student meditates a bolder flight; he is eager to enter upon court practice, either at the Equity, Common-Law, or Criminal Bar. Then the first question to be asked, is one all-important. Are his LUNGS equal to the severe task he is so anxious soon or hereafter to impose upon them? Of keeping them in almost constant play from morning to night? The Bar requires signal strength in that organ! The question, be it observed, is not whether the *voice* be strong, flexible, harmonious—though this is a capital point—but whether that on which the voice *depends*—the lungs—can be relied upon. The pipes of an organ may be capable of giving out tones of great power and exquisite richness; but what if the bellows, beneath, be crazy, and give way? Let us ask, then, the student, whether there be an hereditary tendency to *consumption*, in his family, of which any serious symptoms have been discovered in himself? Because, if so, coming to the BAR, with a view to practice in court, is downright madness. Any honest and skilful medical man will tell him so. It is not the perpetual and often violent exercise of the voice, alone; it is the EXCITEMENT, the ceaseless wearing of the body and mind, that will kill him, as inevitably as it is encountered, and persisted in.

* See *post*—“Different Departments of the Profession.”

How frequently is this predisposition the fell attendant upon genius! Supporting it with a precocious energy,—flattering and deluding it with a semblance of strength, which only accelerates its destruction! What avail the noblest intellect, consummately disciplined, the most brilliant and profound acquirements—a perfect aptitude for business—resplendent prospects—to him whose sun is appointed ‘to go down at noon!’—‘But does not this apply, with nearly equal force, to all professions?’ By no means. At the Bar, the lungs are in incessant exercise; the consuming fire of excitement is ever kept up by eager, restless rivalry, fed by daily contests, public and harassing; by anxieties which haunt the young lawyer, not during the day only, but also the night. ‘We seldom or never, however, hear,’ says one, ‘of such instances as you are speaking of.’ Perhaps not; you may not be in the way of it; youth, besides, averts its eye from the dismal spectacle of premature decay, and shuts its ear to the loudest voice of admonition. Nevertheless, such cases occur! but there is an obvious reason for their infrequency amongst those standing in the more conspicuous ranks—the most distinguished and successful members of our profession. They could not have *reached* their present station, if they had had to fight all along against this fatal tendency. All who have been able to stand so long in the flames, may safely be pronounced fire-proof: whatever other disorders they may be ‘heirs to,’ *this* is not one of them. No, this cruel fiend early despatches its victims; it lurks about the threshold, and strikes them *there*!

May these lines, however *now* contemptuously hurried over and disregarded by the eager ambitious student, not be recalled, ere long, amid the sad scenery of a sick-chamber,

by one drooping in premature decay—others who might have been long availed by only ordinary services—by discretion in the choice of a profession—by this these dreadful apprehensions in all cases serve to give the law of eloquence, and confer a dignity in the eyes of society and obscurity? By no means. How many have been adopted and obstinately adhered to the law when their talents, both mental and physical, would have rendered the pulpit, or possibly even other more useful and more chosen! How many more have achieved the fame of literature and philosophy, transmitting to posterity an enduring reputation, had they not been buried in the dead sea of law—for such it is to those who are without and ingloriously extinguished. Sometimes, however, the inclination towards legal studies might be overcome, let it be yielded to the temptation. Let the ambitious frail candidate for fortune improve his talents, perform a long summer's vacation. Next we see in this comparative repose the student grows up that and succeed in making some reputation by his talents and perseverance in the pursuit of the scientific, and at length without their possession, neglecting, gradually and cautiously, the trying ordeal of public examination at the Bar, or in the Senate.

Smile not, young reader, from the thoughtless friends—at this apparent trifling of regard we must not it be as a word to the wind—there is too much in it.

Let us, then, take it for granted that the law is a physical disqualification. How is it with the man? The shell may be sound, when the heart is not.

velled, or gone. Have you ever thoroughly examined your own MIND, so as to be able to form a tolerably fair judgment of its capacity, qualities, and pretensions?*

Have you a capacity and *disposition* for persevering application? Are you conscious of a logical and argumentative turn of mind? Are your perceptions quick and clear?† Is your memory capacious and retentive? Your judgment sound? Are you—aspiring after eminence—capable of extensive or deep research? Not only of acquiring learning, but *using* it? Do you believe that you are, or can become, equal to the ‘occasion SUDDEN,—the practice dangerous’—spoken of by Lord Coke?—Have you, or do you think that you can acquire, the collectedness, presence of mind, self-reliance, and self-control, which this will require? That ductility, elasticity, activity; that expansive and contractile power of mind which can adapt itself to everything, and pass in a moment from one engagement to another, of the most different character—

* See how a great living poet engaged on this momentous task !

“Several years ago,” says Mr. Wordsworth, “when the author retired to his native mountains, with the hope of being able to construct a literary work that might live, it was a reasonable thing that he should take a review of *his own mind*, and examine how far nature and education had qualified him for such employment. As subsidiary to this preparation, he undertook to record, in verse, the origin and progress of his own powers, as far as he was acquainted with them.”—Preface to “The Excursion.”

† “*By a clear intellect*,” says a judicious writer on legal education, “I mean the faculty of darting in a moment upon the truth. This is, indeed, a choice gift of nature; it may be improved, but it can never be acquired; it is that power before which ambiguity and confusion fly away; it is that influence which irradiates whatever system it pervades, which separates in an instant the most entangled and perplexed ideas; it descends to the minutest circumstances in the affairs of man, and dissipating the mists with which they may be enveloped by craft or by ignorance, draws forth to the light that little secret motive which gives them their real character, and which is so often sought in vain.”—*Railby*, p. 37.

from labyrinth to labyrinth—with unwearied energy, with a mind unconfused? Are you capable of fixed attention? Are you gifted with natural powers of persuading, and convincing, equally, superior and inferior minds—cultivated, and uncultivated? Of publicly detecting and confounding artful falsehood and imposture in the witness-box? If you have not valid pretensions to such qualities as these, or most of them, you certainly need not abandon your design of entering a court of law or equity, but must content yourself with a comparatively humble station in it. You may earn your five hundred, a thousand, fifteen hundred, or possibly two thousand a year, as well as the reputation of a ‘clever man,’ a ‘sound lawyer,’ but can never hope to reach and occupy the dazzling heights of the profession,—where now stand a Lyndhurst and a Follett!

If you have these mental requisites, but yet are conscious of an invincible *mauvaise honte*—a timidity which will disable you from acting a bold and prominent part in public business, let not *this* deter you from entering our profession. There are the less conspicuous, but by no means less honourable, lucrative, and responsible departments of chamber-practice above-mentioned, waiting to receive you;—where are ever to be found men distinguished by their eminent abilities, and not unfrequently general, as well as professional acquirements. Fearne, Hargrave, Butler, Tyrrell, Duval, and their surviving successors—are, in their way, as worthy objects of imitation, and their stations of ambition, as their more brilliant rivals of the Bar.

Supposing a candidate for the highest forensic honours to feel justly conscious of the reasonableness of his pretensions—he yet stands in need of many words of warning!—

What patience—what fortitude are absolutely indispensable in the vast majority of cases!—Unless he be blessed with ‘a connexion,’ it is highly probable that many years may elapse before the door of practice will open to him who may be incomparably best qualified for it. “This length of time in the approaches to practice must be endured,” says Roger North, “for what inconvenience is it, *when a man has once firmly dedicated his whole life to the law?* If any good fortune invites to any steps forwarder—there he is to embrace the opportunity; if not, he cannot be secure of moderate success in the profession, but by entering by proper means, and not *per saltum*, leaping over hedge and ditch, to come at it. An egg may have more than its natural heat, but will hatch or be addle; therefore let the motions be rather phlegmatic than mercurial—for ’tis a true saying, ‘soon ripe, soon rotten.’”* He must not dream, with puerile eagerness, about shutting his elementary law-books, to hurry into court,—to harangue a jury, or argue before a committee of the House of Commons, or before the judges! In the tedious interval which must elapse between preparation and employment, will be required all the young lawyer’s fortitude and philosophy. He must be content to ‘bide his time’—to ‘cast his bread upon the waters, to be found’ only ‘after many days.’ He must never give up; he must not think of slackening his exertions, thankless and unprofitable though they seem to be. Does he imagine that *his* is the only unwatered fleece?—Let him consider the multitude of his competitors, and the peculiar obstacles which, in the legal profession, serve to keep the young man’s ‘candle,’ be it never so bright, so long ‘under a bushel.’ How many, with pre-

* Disc. Stu. Law, pp. 34—35.

tensions vastly superior to his own, are still pining in undeserved obscurity, after years of patient and profound preparation! *—It is impossible to disguise this sad fact—it would be cruel and foolish to attempt it. The student of great but undiscovered merit, will sometimes be called upon, his heart aching, but not with ignoble envy!—to give his laborious and friendly assistance to those who, immeasurably his inferiors in point of ability and learning, are rising rapidly into business and reputation, through accident, through connexion,—it may be, even, through undue and unfair advantage and favour. *THIS*, also, our student must learn to bear! He must repress the sigh, force back the tear, and check the indignant throbbings of his heart, while, in the sad seclusion of unfrequented chambers, or the sadder seclusion of crowded courts, he watches year, perhaps, after year passing over him, ‘each leaving—as it found him.’ ’Tis a melancholy but a noble struggle to preserve, amid such trials as these, his equanimity—‘in patience to possess his soul’—To be

True as the dial to the sun,
Although it be not shone upon.

Let him neither desert, however, nor slumber for a moment at his post. “In this lottery,” happily observes the author of *Eunomus*, “the number of great prizes will ever bear a small proportion to the number of competitors. You, or

* “Lord Thurlow attended the Bar several years unnoticed and unknown. The practice of Lord Chancellor Camden was at one time so inconsiderable, as almost to determine him on abandoning the profession. Lord Grantley is said to have toiled through the routine of circuit, and a daily habit of attendance at Westminster Hall, for many years, without a brief.”—*Will. Stu. Law*, p. 134. This list might be extended by adding the names of a very great number of the most eminent men during the last fifty years—some of them being at this moment among the brightest ornaments on the Bench, and at the Bar.

any of your contemporaries, may or may not in the end have the very prize on which you fixed your eye at the onset ; but can he EVER have it, *who takes his ticket out of the wheel, before the prize is likely to be drawn ?* For our comfort, however, in this lottery of the profession, there are comparatively but few blanks, if, indeed, there be strictly any. The time and labour we employ, which may be considered as the price of our tickets, must always produce useful knowledge ; though the knowledge that is acquired may not be attended with the profit or eminence which we expected." *

There seldom yet, said a great judge, has been an able and determined man who did justice to the law, to whom it did not, in turn, at one time or another, amply do justice. His success is sometimes as sudden, as splendid and permanent. Lord Mansfield, Lord Erskine, and others who could be mentioned, are said to have known scarce any interval between an income of two or three hundred pounds and as many thousands a-year. In a moment, in the twinkling of an eye, the desolate darkness is dissipated ; the portals of wealth, popularity, and power, are thrown open ; and he does not walk, but is in a manner thrust onward into their radiant regions. *Non it sed fertur.* For all this he is fully prepared ; the 'viginti annorum lucubrationes' bear him up under the most unexpected accumulation of business, and enable him calmly to take advantage of this 'occasion sudden'—doing honour to himself, as well as to those who are honouring him !

Has the ambitious student, in the last place, those PECUNIARY resources which will enable him *toto pectore studiis incumbere*—to give his mind to the study of his pro-

* Wynne's Eun. Dial. II. p. 295—6.

fession, without distraction? It will be a sad thing for him, if in addition to the exhaustion of his professional studies, he be harassed by clamorous creditors, and defeated in his anxious endeavours to acquire 'by daily toil his daily bread,' either as a reporter for the newspapers, contributor to magazines, or slave, in any other capacity, of the booksellers—or by following any calling inconsistent with the dignity of the profession, and the complete devotion of his energies to the study of the law. His intellect, he will find, cannot last long, when burning thus at *both ends*. No doubt some of the greatest men who ever adorned the Bar, have struggled to it amidst poverty and even starvation; men whose superior energies would have conquered everything: but it is equally true that thousands, miscalculating their means and prospects, have early fallen victims to that 'heart sickness' which arises from 'hope deferred,' have been quickly *crushed* by pecuniary embarrassment;—withering under bodily and mental disease—and too often, alas! suffering themselves to be driven into dishonour—into reckless and disgusting profligacy!

Since the original publication of this work, so many applications have been made to the author, by letter, for detailed information upon this subject—undoubtedly of urgent importance and interest to one meditating an entrance into our profession—that he thinks it may be useful to introduce here the substance of the answers which he has given on such occasions, premising that it is obviously impossible to lay down any general rule on the subject.

To begin with the beginning. *First*, an outlay of about 35*l.* is requisite to pay the fees, stamps, &c., attending the admission into any of the four Inns of Court. *Secondly*, 100*l.* must be deposited with the treasurer, by way of

degrade forensic costume, he will have opportunities afforded him, by those of corresponding complexion in the other branch of the profession, of making discreditable and degrading exhibitions in public. But why should it be so? How comes it to pass? The root of the evil is to be sought for in the excessive facility of access to the Bar, which has existed of late years. It is impossible to guard the portals of such an edifice with too great vigilance: and to whom is that responsible duty, in the first instance, intrusted? *To the members of the Bar themselves*;—in the nature of things it cannot be well otherwise. Let us see, then, how the matter stands. Before any applicant will be admitted by the Benchers a member of an Inn of Court, he must produce a written document to the following effect:—

"I, James P——, aged ——, of ——, in the county of ——, in [England, Ireland, or Scotland, or elsewhere, as the case may be,] the —— son of ——, of the same place. [Peer, Benchers, Barrister, Clergyman, Gentleman, Banker, Merchant, *Esquire*,* &c. &c.] am desirous of being admitted a student of the Honourable Society of ——, for the purpose of being called to the Bar. Witness my hand, this —— day of ——, 18 . JAMES P——."

To this is appended, on the same sheet of paper, the following 'certificate,' *signed by two Barristers*:—

"We, the undersigned, do hereby certify, that we know the above-named James P——, and believe him to be a GENTLEMAN, of CHARACTER and RESPECTABILITY, and a FIT and PROPER person to be admitted a member of the Honourable Society of ——, for the purpose of being called to the Bar.

"A. B——, a Barrister of ——.

"C. D——, a Barrister of ——."

If these signatures be genuine, are not the Benchers justified in giving implicit credence to the statement, the

* i. e. Manufacturer, artificer, shop-keeper, &c. &c. &c.

less, be denied that there have been instances being admitted into the ranks of the Bar, capable of nothing but degrading it. This is affecting, not the feelings and interests of the body only, but the public, who intrust their interests to the confidence and advocacy of it from whose ranks, moreover, are selected all that are charged with the high responsibility of administering justice to the country. The right hand of fellowship ever has been, and ever will be, cordially extended to the humblest new-comer, if he be but a gentleman in his feelings, and in his conduct; the amplest allowance being made, in such case, for all other defects. We are, at the same time, aware that desperate distress, the presence of strong temptation, prompts its victims unchecked by virtuous principle, to practices which are scandal to the Bar, and calculated, if tolerated, or if dealt with, by that Bar, to degrade it from the high position in public estimation which it has occupied from immemorial. And how is this? Because meaner misconduct are generally, in the case of members of the Bar, exhibited, when they do occur, upon so conspicuous a stage, as to challenge public observation and censure, a portion of which can scarcely fail of attaching, in public estimation, to the body at large. *Qui in excelsis agunt, eorum facta cuncti mortales novêre.** It is such delinquents are quickly detected and shunned with indignation by the contemptuous Bar; but, though they whisper in the ear of the public, "they are not of our fellowship," yet they are not excluded from the fellowship there, it too soon supinely permits.

* Sall. l.

truth of which these signatures attest? Can those Benchers go further, without something like offensive distrust being exhibited towards two members of the Bar? And if so important a document be signed without a due consideration of the grave responsibility thereby incurred—is it not plain, that *a gross breach of duty to the profession at large has been committed*—nay, that a fraud has been practised upon it? That the Benchers, however anxious to secure the respectability and dignity of the Bar, have not obtained that specific security on which they had a right to rely; but have been, in fact, leaning on a broken reed? Suppose, again—to illustrate the mischief thus effected—this James P—— be, to use a vulgar but significant expression, ‘*a black sheep* :’ how many more of *his fellows* will he not be thus enabled to introduce to the Bar? It is doubtless the sacred duty of the Benchers—an experienced, independent, high-minded, class of men—who are intrusted with the guardianship of the honour and reputation of the Bar, to interfere in cases of proved misconduct, and, as the case may warrant, censure, suspend, or expel, the delinquent; but they have no jurisdiction, except over the members of the Bar, and those who have undertaken, on being admitted to the Inns of Court, to become such. And how strong a case must be clearly established, before they can be expected to proceed to such extremities? But if, when a clear case of misconduct is brought under their notice, they refuse, or even hesitate, to interfere, *then*, undoubtedly, they are guilty of a grave dereliction of duty, and become accessary to the degradation of the dignity of the Bar, and to the serious injury of the public interests entrusted to them.

Without attempting to suggest, in the slightest degree,

invidious comparisons between the Inns of Court, we feel proud in being able to bear testimony to the anxious vigilance evinced by the Benchers of the Inner Temple to admit (as far as so desirable an object can be attained) only properly qualified persons as students—one means being the *bond fide examination* instituted, in order to ascertain their “*competence in classical attainments, and the general subjects of a liberal education.*”* The effect has long been visible in the class of persons who have of late years become members of that ancient, wealthy, and distinguished Inn of Court.

Passing away, however, from such painful topics, let us contemplate the case of a person, however humble his original position in society, of such honourable personal character, and capacity of intellectual excellence, as render him worthy of that cordial welcome into the ranks of the Bar, which he will assuredly receive. He will become immediately the associate of as high a class of men as are to be found in the country, in respect of education, intellect, reputation, learning, and family; and will find his account in conducting himself among them with manly modesty, with courtesy, with independence, and a due degree of *reserve*. He will soon detect the *low class men*—such there must be in all professions—and, in observing them, will not fail to note the signs by which intellectual, moral, or social inferiority unconsciously and inevitably betrays itself. He, in short, it is presumed, is of sufficient *age* to be capable of arriving at an independent judgment on the important subject now proposed for his consideration; and it is hoped that the foregoing and ensuing pages may afford him some *help* towards forming that judgment.

* Form of the Examiner's Certificate to the Benchers.

He will have no one to thank but himself, if, after all that has been said, he should miss his way, by obstinately struggling into a profession for which he is utterly unfitted; or, *being* fitted for it, 'with all appliances and means to boot,' should yet throw himself away, by adopting one that is unworthy of him. If, however, in the spirit of prudent and honourable enterprise, he should decide upon adopting the Bar—then we say to him, cheerily,—
LEGI TE TOTUM DEDICA; NAM DIGNUS ES ILLA, ET ILLA
TE DIGNA.*

* Seneca.

CHAPTER III.

STUDENTS :

THEIR CHARACTERS, OBJECTS, PRETENSIONS, AND PROSPECTS.

THE varied throng of candidates for admission to the Bar, will be found, perhaps, separable into three classes : and then we shall be enabled, by looking more distinctly into the characters and objects of each, to form a just estimate of their respective pretensions and prospects. It is proposed to devote this chapter to such an inquiry ; shortly suggesting what each individual has to expect, and what not ;—what to learn, and what to unlearn. The *study*, and the *student* will then, it is hoped, have been fairly introduced to each other.

The first class comprises those who may for convenience's sake be styled *merely nominal or amateur* students ; the second, those who seek to qualify themselves for the duties of the legislature or magistracy ; the last, those who purpose becoming actual practitioners. Of these, then, in their order.

I.—The class of merely NOMINAL, or amateur law students, consists of those who become such simply from a desire to attach themselves formally to one of the learned professions, with no intention of ever practising, with no necessity indeed for doing so. Many of these belong to the

very highest classes of society, and have no other object in view than amusement and *quasi* occupation, before coming into the full possession of their fortunes. Need it be said that such are always welcome and even valuable additions to the society of the Bar?

Many young gentlemen, not of this highest class, enter, or are sent to, the Bar, as others into the army, navy, or perhaps the church—purely to *say* that they belong to it; and are influenced in doing so, seldom by any other feeling than that of indolence or indifference. Some, to be sure, contrive to gratify their vanity, and that of weak relatives and friends, by the hope of hearing themselves sometimes spoken of as “*the learned gentleman* ;” and feel as much satisfaction in being able to assume, at will, the grave imposing vesture of counsel, as others experience in wearing the gay and dashing uniform of the soldier. They are certainly entitled, by this means, to a good seat in the courts, when interesting trials are on; and to go the circuit, and share its excitement, frolics, and variety. It is not, in short, a very expensive way of securing a pleasant, and sometimes eminent acquaintance—of purchasing, as it were, a *free admission*—both before and behind the scenes—to the entertainments of the legal theatre! A few of these gentry there may be, who are forecasting enough to anticipate the possibility of their present means not always enabling them to continue the life of a fine gentleman; and that it may therefore be advisable to secure a *chance* of employment at the Bar, if, unfortunately, there should ever be a necessity for it. They will be possessed certainly of long standing; and will, besides, *no doubt*, find it as easy to assume business-habits, and acquire legal knowledge when need-

ful, as their wig and gown! Chambers will thus be a shelter from the pitiless pelting of the storm of poverty. They will be found in the estimation of some few other members—but, thank Heaven, constituting a very small minority—of this class, delightfully calculated for wine-parties, as well as hiding-places from inquisitive relatives, and impertinent creditors. If overcome with *excitement*, at any of those vivid scenes of enjoyment which a London life affords, they can retreat to chambers at a moment's notice, bar the outer door, and sleep off a debauch in sacred silence!

“ ‘Nempe hoc assidue!—jam clarum mane fenestras
Intrat, et angustas extendit lumine rimas.’
‘Stertimus, indomitum quod despumare Falernum,
Sufficiat—quinta dum linea tangitur umbra.’
‘En, quid agis! siccas insana canicula menses
Jamdudum coquit!—* * ‘Verumne! Itane!’
‘Jam liber, et bicolor positis membrana capillis
Inque manus chartæ, nodosaque venit arundo.
Tunc queritur, crassus calamo quod pendeat humor:
Nigra quod infusa vanesciat sepiæ lymphæ:
Dilutas queritur geminet quod fistula guttas.
O, miser!—inque dies ultra miser!’” *

Never need this sort of student be at a loss for an account of himself, when questioned by one who is pleased to think himself entitled to receive one. Is he absent from his chambers? He is at those of the pleader, or barrister, under whom he *studies*! Is he not there?—He is gone down to court, either at Guildhall or Westminster, to hear a great cause tried, in which he has drawn the pleadings. Is he not to be found *there*? He has returned, indefatigable man, to his chambers, there to digest the legal acquisitions of the day!

To be serious, however. These last are the gentry

who form the dead-weight of the profession; these the precious personages, who, under the name of “briefless barristers,” contrive to attract the notice of the “pensive public” as melancholy instances of neglected merit—afflicting evidences of an over-stocked profession!

II.—The second class of students is a select and distinguished one, consisting almost exclusively of those young men of rank and fortune who, born to an exalted station, are not satisfied with barely occupying it, but are inspired with the proud ambition of “magnifying and making it” still more “honourable;” who—if we may be pardoned a professional allusion—will not inherit, but purchase greatness.

————— “Honours happiest thrive
When rather from our acts we them derive
Than our foregoers.”

Duly appreciating the importance of the duties which will, or may, ere long, devolve upon them, they are nobly anxious to qualify themselves for filling worthily the important office of magistrates, or sustaining the more splendid responsibilities of legislators and statesmen; by obtaining, if so disposed, and competent, that from which much will be hereafter expected—a thorough and comprehensive knowledge, both theoretically and practically, of their country’s constitution, and of the legal relations, rights, and duties of civil life. To the paramount importance of acquiring such knowledge, all the greatest and wisest men have borne testimony. The Emperor Justinian * thus, at the close of the Proemium to his “Institutes,” addressed

* “*Summâ itaque ope, et alacri studio, has leges nostras accipite : et vosmet-ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempublicam, in partibus ejus vobis credendis, gubernari.*” —Justin. in Proem. Inst. [Dated the 21st Nov., A.D. 533.]

the noble youth of his dominions, for whose use he had caused those Institutes to be prepared :—

“ Receive, then, these our laws, and address yourselves at once to the study of them, with cheerful energy ; and show yourselves such proficient that, having thoroughly mastered them, you may justly cherish the brightest hopes of bearing a part in the government of your country, and acquitting yourselves with honour in the offices which may be entrusted to you.”

One of the constitutions of our own King Alfred expressly required that his nobility should be instructed in the laws. Without this knowledge, indeed, a man will advance but vain and frivolous pretensions to exercise the functions of a statesman or a legislator. It is true he may be *eager* enough to meddle with such matters ; he may be, indeed, “ given to change ;” he may become, perhaps, a showy declaimer, fluent in the use of pompous common-places—that is, if either house of parliament will tolerate his puerile inanities ; he may possibly acquire credit on occasions of minor, of mere temporary or local interest and importance ; but on the stirring, grand, national, CONSTITUTIONAL questions, which are often so *suddenly* started, he will be, he needs must be, an inglorious mute ; his “ vote and influence ” may be solicited by the contending parties, but nothing further will be expected, or indeed permitted. Such information as is required on *these* occasions, however great may be his zeal or talents, or intense his desire of distinction, he neither has, nor can get. No *cram* will suffice ; nothing but the careful leisurely acquisition of early years, assiduously kept up—at once generating and justifying confidence and self-reliance—will enable a man to acquit

himself, on such occasions, even creditably. And how often, in these pregnant times, do such occasions arise—what melancholy exhibitions are sometimes the consequence!—The incompetence of the House of Commons for the task of legislation, called forth, a few years ago, (1834,) even from one of its most enthusiastic friends, the late Lord Chancellor (Brougham), this remarkable reproof:

“If there had been no House of Lords, the House of Commons must have stopped its legislation; or if it had worked on, it would have been COVERED WITH BLUNDERS AND ABSURDITIES.” “I mention this,” said his lordship—alluding to a clause which the Commons had insisted upon inserting into the Justice of the Peace Bill,—“as a proof of the ABSURD LEGISLATION of the lower house.”* Have no subsequent exhibitions justified as severe a censure? His lordship might, and perhaps ought, to have added, the *dangerously* absurd legislation of the lower house: for what is to become of a country when either its existing laws, or proposed enactments, are thus ignorantly tampered with? Would to Heaven that those eager young gentlemen who consider that the letters “M.P.” tacked to their names, operating as though by magic, impose at once the duty and confer the ability, as they certainly do the *inclination*, to fall a-tinkering our laws, would devote to the learning and understanding of them, but a tithe of the trouble they devote to mending and making them!—There might not then be found crowding our statute-books, “acts to amend acts, to repeal acts, to alter amendments of acts,” and so on, in infinite succession; preambles, containing pedigrees each as long as that of a thorough-bred racer!

* Debates in the House of Lords, on the 13th August, 1834. *Vide the Times*, 14th August, 1834.

The tendency to excessive activity exhibited of late years, by the House of Commons, and which it requires the utmost vigilance and firmness of an enlightened government to restrain, so as to avoid the evils of incessant tampering with the most important institutions in the country,—is perhaps not more to be deprecated, however, than the comparative supineness and inactivity, with a few recent instances to the contrary, exhibited by the House of Lords in its *legislative* capacity. “I would ask,” says Dean Swift, in his Essay on Modern Education, “how it hath happened, that in a nation plentifully abounding with nobility, so great share in the most competent parts of public management, hath been, for so long a period, chiefly intrusted to Commoners, *unless some omissions or defects of the highest import may be charged upon those to whom the care of educating our noble youth had been committed?*” *

Without stirring that very delicate and difficult question which has been recently the subject of public discussion, viz. the alleged distinction between *lay* lords and *law* lords, with reference to the exercise of *judicial*† functions; we may be permitted to express, with the utmost diffidence, a doubt whether the great body of the peers constituting that illustrious assembly, are not supinely devolving, more and more every session, upon some half dozen of their more active and junior brethren, the performance

* Works, vol. iv. pp. 40, 41.

† “The law,” says Mr. Justice Blackstone (Comm. iii. p. 57), “reposes an entire confidence in the honour and conscience of the noble persons who compose this important assembly [the House of Lords], that, if possible, they will make themselves masters of those questions upon which they undertake to decide, and, in all dubious cases, refer themselves to the opinions of the judges who are summoned by writ to advise them.”

of those VASTLY RESPONSIBLE duties, for which the former are, with due and early attention, perfectly qualified by their education and opportunities. Is it not notorious that the most extensive changes in the administration of the law—in the body of constitutional law—changes the effects of which are often incalculably important—are effected by Bills either brought up from the lower house (where they have probably been almost as listlessly dealt with) to be read by some Law Lord—briefly described by him, and then *passed*—almost as a matter of course? There have been, and very recently, exceptions—but that such is the ordinary course, is notorious to every reflecting observer. Why *should* it be so? Why should these great hereditary guardians of the constitution spare themselves real, downright, and persevering labour to master the principles and actual working of that constitution, so as to form an enlightened practical opinion upon all questions discussed in that higher chamber of the Legislature? Prince Albert has set before our young nobility a bright example, by the systematic pains which he has taken to acquire correct information upon constitutional law, under the guidance of a distinguished member of the Bar : * would that others could tread in his footsteps—that our young peers would resolve to become hereditary *real*, instead of merely nominal, legislators !

Could it be otherwise than highly gratifying to the country to see its nobility sending their heirs and probable successors to the chambers of the most learned practitioners of the law, for a brief period—say a single year—to acquire, under competent guidance, a practical insight into the

* MR. SELWYN, Q. C., the author of the celebrated Treatise on the Law of Nisi Prius.

working of the law—the *actual operation* of those great principles which so often become the subjects of parliamentary discussion? Could a twelvemonth thus spent have been better spent?

The young legislator will see, in a lawyer's chambers, the noble system of our Constitution in all its vast, intricate, and "perfect working;" coming home to the business and bosom of every individual,—regulating all the transactions of society,—“the very least as feeling her care, the greatest as not exempted from her power.” Our physicians dare not attempt to administer the simplest physic, our surgeons to perform the commonest operations on the human body, without having first learned the difference between diseased and healthy structure and function—without having seen and studied all its inward parts, devoting to the most secret and minute, their profoundest attention; but our state physicians will administer the most potent medicines, our state surgeons perform the most capital operations, without having even affected to learn the plainest principles of state medicine, pathology, or surgery, or devoted a single moment to dissection! What, then, *can* they be, in plain terms, but most impudent and presumptuous quacks? And what is to become of the state patient? *

* Long after this paragraph had been written, the author happened to meet with the following passage in the writings of Lord Bacon :—

“And for matter of policy or government, that learning should rather hurt than enable thereunto, is a thing very improbable: we see it is accounted an error to commit a natural body to empiric physicians, which commonly have a few pleasing receipts, whereupon they are confident and adventurous, but know neither the causes of diseases, nor the complexions of patients, nor peril of accidents, nor the true method of cures; we see it is a like error to rely upon advocates or lawyers, which are only men of practice, and not grounded in their books; who are many times easily surprised when matter

Well, indeed, would it be—a cheering and noble spectacle to the people of this kingdom—if not only our hereditary legislators, but *all* who are members of, or likely to obtain seats in, parliament, would set themselves more earnestly about acquiring a practical insight into the working of our laws. It is sought not to make them *lawyers*—to weary and disgust them with details—though it would be well for them, even in these matters, to know, if not the law, at least where it is to be found; but call upon them to cultivate an early and enlightened acquaintance with that constitution of which they are the natural guardians, and whose provisions they will be so soon called upon to administer.

To the Justice of the Peace a much more accurate knowledge of legal principles and practice is manifestly indispensable. To him it is not so much a credit to know the law, as a high disgrace to be ignorant of it. How can he administer, who does not understand, the law?—called upon, too, as he frequently is, to decide very difficult questions *promptly*! An ignorant, can scarcely fail of being an unjust judge; and unless the magistrate be well grounded in the principles of law—especially of *evidence*, as well as moderately skilled in applying them, he must reckon on being often placed in the most mortifying position;—on being puzzled and ridiculed by an impudent pettifogger, and set at defiance even by a criminal.

A sound legal education is almost indispensable, indeed,

falleth out besides their experience, to the prejudice of the cause they handle: so, by like reason, it cannot be but a matter of doubtful consequence, if states be managed by empiric statesmen, not well mingled with men grounded in learning. But contrariwise it is almost without instance contradictory, that ever any government was disastrous that was in the hands of learned governors.”—*Advancement of Learning—Works*, vol. ii. pp. 16, 17.

to magistrates, whose jurisdiction has, in late years, been extended so very far beyond the bounds originally assigned to it, and adhered to for centuries. They have now to decide on a great number of facts, civil as well as criminal, which must formerly have been decided before a jury, and in a superior court. They are now, in almost all cases, unconnected with contract (and even in many matters of contract, *viz.*, between masters and their apprentices and servants in particular trades, members of Friendly Societies, fixing the amount of salvage, &c.), clothed with power to hear and determine—combining in themselves the several powers of a judge, a jury, and a court of equity: and the manner in which their arduous duties are discharged, is watched by the public with unfaltering vigilance—supplying a powerful stimulus to a zealous and able exercise of their important functions.

Let, then, the distinguished individuals of whom we have been speaking, enter our profession, with cheerful resolution to undergo its honourable discipline. They will find it not only the true and only source of constitutional learning, but the finest school for talent, perhaps, in the world. Infinite pride, conceit, and pedantry, are rubbed off in a single month's friction of its fearless rivalry; and a volatile temper may have here its best, and perhaps latest chance of being sobered and settled into business habits. "Goe now, yee worldlings," says old Bishop Hall, "and insult over our palenesse, our needinesse, our neglect. Yee could not be so jocund, if you were not ignorant; if you did not want knowledge, you could not overlooke him that hath it: for me, I am so farre from emulating you, that I professe I had as leive be a bruit beast as an ignorant rich man. How is it, then, that

those gallants which have privilege of bloud and birth, and better education, doe so scornfully turne off these most manly, reasonable, noble exercises of scholarship? An hawke becomes their fist better than a booke: no dog but is a better companion.”*

The profession, it is repeated, opens wide its arms to receive the visiters of whom we have been speaking; but reasonably, confidently, expects them, in return, to exalt it in public estimation, not by the bare fact of their having belonged to it, but by exhibiting proofs of the high culture they have received,—of their having left it wiser and better men than they had entered it. Should, however, any aristocratic *idler* now enter our profession, with a view of finding thereby only a ready access to place and sinecure, we may pretty confidently assure him that he will find himself mistaken. The time for this sort of speculation is gone by. Whatever disposition may have existed at any time, to create and dispense such patronage as is sought for by these gentry, the vigilance of the Bar, and fearless surveillance of the press, render success in such attempts a task of daily increasing difficulty. Legal office, of any kind, can now be rarely obtained, or at least *kept*, by any one who is not able personally to discharge its duties; and in order to do so, the candidate must

“Doff his sparkling cloak, and fall to work,
With peasant heart and arm,”

must forget, for a while, splendid connections, fastidious tastes, and fashionable life, and enter himself in the number of those who constitute our *third* class. Nor let him fancy that in doing this, he is “condescending to

* Epist. to Mr. Matt. Milward.

men of low estate." No, indeed, he is entering a stern *republic* in coming to the Bar. Nothing will suffer, in its perpetual collisions, but that preposterously short-sighted pride—that leprosy of "exclusiveness," which blights like a disease some of the inferior and more recent members of the aristocracy; as the hem of a splendid garment is generally the part most liable to be tarnished and defiled! No magnificent airs of puppyism and presumption will be tolerated at the Bar; in vain are their half-closed eye and curled-up lip brought into play; they are laughed at, and their luckless absurd exhibitant unceremoniously thrust aside! "I confesse I cannot honour blood without good qualities; nor spare it with ill," quoth the same stern old bishop already quoted. "There is nothing that I more desire to be taught, than what is **TRUE NOBILITY**: what thanke is it to you that you are *born* well? If you could have lost this privilege of nature, I feare you had not been thus farre noble: that you may not plead desert, you had this before you were; long ere you could either know or prevent it; you are deceived if you think this any other than the *body* of gentility: the *life* and *soule* of it is, in noble and vertuous disposition, in gallantnesse of spirit without haughtinesse, without insolence, without scorneful overliness: shortly, in generous qualities, carriage, actions. See your error, and know that this demeanour doth not answer an honest birth." *

III. The third class, and for whose use this volume is chiefly designed, comprises all those who come to the Bar in search at once of a livelihood, and of distinction; and this class it will be necessary to subdivide.

• Ep. vi.—"A Complaint of the Mis-education of our Gentry."

First, come the University men ; and foremost among these, the STARS of their respective years—senior wranglers, double first-class men, fellows of colleges, and prizemen of all kinds and degrees, classical and mathematical,—a brilliant band ! Hear what Lord Coke saith of the advantages of a college education, as exemplified by “our great master,” Littleton himself :—“By this argument, logically drawne *à divisione*, it appeareth how necessary it is that our student should (as Littleton did) come from one of the Universities to the studie of the common law, where he may learne the liberall arts, and especially logick, for that teacheth a man not only by just argument to conclude the matter in question, but to discern between truth and falsehood, and to use a good method in his studie, and probably to speak to any legall question, and is defined thus :—*Dialectica est scientia probabiliter de quovis themate disserendi*, whereby it appeareth how necessary it is for our student.”*

It is a striking circumstance, highly honourable to our Universities, as well as to the eminent persons who are the subjects of the observation, that, with two, or at most three exceptions, every one of our present Common law and Equity judges was educated at Oxford or Cambridge ; some of them, moreover, having obtained the highest honours there.

Perhaps it may be safely said, that of this division of students, those who have distinguished themselves in mathematics are, *cæteris paribus*, best adapted for the law ; but, in fact, *all* of them have undergone such systematic discipline, and evinced such a degree of intellectual superiority, as cannot fail of mastering any difficulty which

* Co. Litt. 235. b.

the law can propose to them. Look at the high places of the profession, for numerous and splendid instances of the truth of this remark! How can it be indeed otherwise, where the *inclination* equals the power? He who has been early accustomed to wrestle with the difficulties of Newton and La Place, to wind his way through the mazes of algebraic calculation—to work out the profoundest problems of a “rigid and infallible geometry”*—need not expect to be baffled by any of the subtleties and complexities of law. Logic so masterly as his, what difficulties can withstand? What multiplicity distract? If indeed the bow have not been over-bent, the mind and body paralysed by excessive exertion—men such as these commence their legal career under the happiest auspices; and but few are the considerations of which those of them need be apprised who seek after court practice. They will soon discover that a vigorous and well-trained intellect is not alone a passport to success. Those qualities and accomplishments, which during a long and exclusive devotion to the mathematics, have been too much disregarded, must now be assiduously attended to. Business habits must be acquired—promptitude, ductility, and decision. The young lawyer must hasten out of the silent, distant regions of abstract speculation, where his faculties have been “wrapt in Elysium,” and learn *to think* amid the hubbub of the world—on the spur of the moment—without being obliged to retreat into the study before his

* Dr. Chalmers. See this expression commented upon in Mr. Maxwell's “Plurality of Worlds”—a work (written in reply to Dr. Chalmers's “Astronomical Discourses”) evincing an amount of talent and information on philosophical subjects, which reflects an unusual degree of credit upon that respectable body of men, the Law Publishers, to whom Mr. Maxwell belongs.

thoughts can be collected. "Another precept of this knowledge" [of ourselves], truly observes Lord Bacon, "is, by all possible endeavour *to frame the mind to be pliant and obedient to occasion.*"* The acquisition of much valuable practical information has been, perhaps, altogether neglected. This also must be remedied: but, above all, (unless the student be happily *gifted* with real eloquence,) the art of public-speaking—of extempore debate—will require early and persevering attention. "Reading may make a full, and writing a correct man:" but it is "*speaking* only that maketh a ready man," according to the maxim of Lord Bacon;—and none but he, has any business to make his appearance in court. 'Tis useless to tell an attorney, in eager accents of admiration, that Mr. Such-an-one was double first class-man—senior wrangler, and first Smith's prizeman; nay, even, that he is an admirable lawyer; if the unhappy individual be nevertheless "a dumb dog that cannot bark,"—be unable to address a judge or jury without confusion, hesitation, stuttering; at once irritating the court, wearying the jury, disgusting the client, and filling his less generous rivals, not with manly sympathy, but secret exultation. "The Cardinal hath a world of wisdom within him, Señor, truly, and with his *pen* might go far towards setting the world by the ears: but as for *speech*, there an't please you, we heed him not; he is a very poor thing, being in a manner tongue-tied."†

If, therefore, this hint be too long neglected, or the student find himself incapable of successfully acting upon it, he will consult his own dignity—his best interests, by preferring chamber to court practice. Men of the descrip-

* Advancement of Learning.

† Don Lopez, a comedy.

tion now under consideration, forming, sometimes, an overweening estimate of their pretensions—of their powers and attainments—are too apt to look with contempt upon means which conduct their inferiors to rapid success. What cares a consummate mathematician—a brilliant classical scholar, about *manner*? Scarcely as little, perhaps, as the court, as clients, as a jury, care about, or will tolerate, *him*. Why will he thus delay his own distinction,* indefinitely postponing employment, for want of a little resolution at the first, to rub off academic rust—to prepare himself for the public struggles into which he is ambitious of entering with dexterous unwilling witnesses, and fluent, practised, humorous counsel? It is hoped that he will find some future portions of this work not unworthy of his attention on this subject; for there is much that is peculiar in legal training—which nothing can point out availably, but a practical familiarity with the profession. Let us lastly remark, that the student who has but just quitted the scenes of academic distinction, is too apt to be unduly elated. It will require, perhaps, no inconsiderable effort, before the swell of excitement and exultation can be made to subside; before the *facile princeps* of his day can get himself into that calm working trim which is essential to the advantageous commencement of his professional career. Let him turn again his dazzled eye, for a moment, to one of the earliest lessons of his boyhood!

— Sapienter idem

Contrahea, vento nimium secundo

Turgida vela.

* Sir William Blackstone, even, was an instance of the sad effects of the deficiencies of which we are speaking. "Being deficient in elocution, and not possessed of the popular talent of an advocate," says one of his biogra-

In a few years he will, assuredly, form a very different—a much soberer estimate of these things; considering them as glistening phantoms of days gone by—or as, at most, merely *means* to an *end*! He must be content to propose to himself a considerable interval of severe labour, during which time he will be lost to the eye of public observation, and the voice of applause. Let him know, however, that during this blank interval in which he disappears from the surface, he is but diving beneath, that he may anon reappear with the pearl he has been seeking—the pearl of professional distinction. He may depend upon it, that thus only can he justify the high expectations of others, and realise the proud hopes he himself has presumed to cherish. To such a man as this, on whom has been lavished all that its noble academic institutions can bestow, the country has a right to look for extraordinary self-denial and exertion. Much will be expected, where much shall have been given!—The country is, however, seldom disappointed, by these her choicer sons, who have from time to time fitted themselves, by a long and arduous course of preparation, for the noble duties of asserting, defending, and administering the laws of England. It is impossible to over-rate the importance to a country of preserving the ministers of its laws “pure and undefiled.”

“The honour of a liberal profession,” says Gibbon, “has indeed been vindicated by ancient and modern advocates, who have filled the most important stations with pure integrity and consummate wisdom: but in the decline of Roman jurisprudence, the ordinary promotion of lawyers was pregnant with mischief and disgrace. The

phers, “his progress was slow.” He is represented as having been excessively chagrined and discouraged at his want of professional employment.

noble art which had once been preserved as the inheritance of the patricians, was fallen into the hands of freedmen and plebeians, who with cunning rather than skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors, by furnishing a rich client with subtleties to confound the plainest truths, and with arguments to colour the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the forum with the sound of their turgid and loquacious rhetoric. Careless of favour and of justice, they are described for the most part, as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment, from which, after a tedious series of years, they were at length dismissed, when their patience was almost exhausted." *

Much of what has been said above, is applicable to many others of those who come to the Bar from the universities, without having obtained, because, probably they did not *seek*, honours. Some of them had not the requisite inclination or ambition, nor others the physical strength. These may be, at the first, less splendid, but ultimately, perhaps, not less efficient or successful competitors for *forensic* honours, as many names of living lawyers on the Bench and at the Bar could be cited to prove. How can they have failed to profit by the enlightened education they have received—to bring, to the study of the law, a liberally-stored and well-trained mind ?

* Dec. and Fall, chap. xvii.

Secondly. Those who come to the Bar, after a noviciate performed in an attorney's office, are not (as already intimated) inconsiderable in numbers; and, if possessed of several peculiar advantages, have also certainly to contend with some disadvantages. However justifiable may have been the somewhat haughty tone, in which this class of students was spoken of by the illustrious author of the Commentaries, in *his* days, it is now *generally* otherwise. The attorney's clerk of 1844 is, or ought to be, a very different person from the attorney's clerk of 1753. The character of ordinary business is greatly altered and improved; and the youth who now enter that walk of the profession, are, for the most part, of great respectability, and have received a liberal and gentlemanlike education.

Such students have had opportunities, undoubtedly, of learning easily and thoroughly what cannot, by scarce any pains, be acquired elsewhere than in the scenes which they have just quitted—the practical working of the law, in all its details: but they are sometimes apt to overestimate the importance of such knowledge. They will have to guard specially against the consequences of a *long familiarity with technicalities rather than with principles*—which certainly is calculated to contract the mind, and even lower the tone of moral feeling.* “By strictly

* “Making, therefore,” says Blackstone, “due allowance for one or two shining exceptions, experience may teach us to foretel that a lawyer thus educated to the Bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice be founded, the least variation from established precedents will totally distract and bewilder him. *Ita lex scripta est*, is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any argu-

adhering to form," observes the celebrated Lord Kames, "without regarding substance, law, instead of a rational science, becomes a heap of subterfuges and inconveniences, which tend, sensibly, to corrupt the MORALS of those who make the law their profession."* Those who render themselves liable to such censure may, to adopt, perhaps, a whimsical, but not an inapt illustration, be compared to the women who are engaged at their fruit-stalls in the dirty work of shelling walnuts: their fingers are blackened with the external rind of thousands—but they never crack the shell—never once taste or even see the kernels!—It is certainly possible to have a mere *journeyman's* knowledge of law; and it was of such proficients that Dean Swift spoke as—"under-workmen, who are expert enough at making a single wheel in a clock, but utterly ignorant how to adjust the several parts, or regulate the movements."†

ments drawn, *à priori*, from the spirit of the laws, and the natural foundations of justice."—1 Bla. Com. 32. "By serving a clerkship, indeed, under the eye of a *steady* and *prudent* master," remarks an experienced writer, "the student will, in some measure, be kept clear of the temptation I have been mentioning. He may easily gain an insight into *practice*,—but then his mind, unused to expatiate, will be confined to the narrow limits of official knowledge. The painfulness of acquiring a taste of law, for the want of the necessary helps, which are drawn from learning, will go near to damp his imagination: and there is scarce any advantage in serving a clerkship, which may not be reaped by the student, without breaking too much upon the time allotted by him for his course of studies and attendance upon courts; because, after he has finished his college education, and begun seriously to apply himself to the study of the law, he may, under the guidance and directions of some able and experienced man, bestow some leisure hours to great advantage, by going through the forms of business, and learning so much of the practice, as to give him a general notion of the conduct of a cause, from its first process to its determination."—Simpson's *Reflections*, p. 26—7.

* Hist. Law, Tr. p. 54.

† "Sentiments of a Church of England Man."—*Works*, vol. iii. p. 47.

Persons of this class are very apt, besides, in the incessant hurry of a five or six years' attendance to the business transacted in an attorney's office, to neglect the acquisition of *general knowledge*. This is a very serious deficiency; requiring much pains and perseverance, but more *judgment* in supplying it. It is laughable to see the directions which are laid down for their 'guidance' in the elder books, and in some even of the modern 'hints,' 'suggestions,' and 'treatises,' which are recommended to their perusal, on quitting the office for an Inn of Court. There is now lying before the author a work published within the last ten years, containing such a preposterous catalogue of works 'on general knowledge,' to be 'carefully and methodically read,' as must have made many a young man's hair stand on end!

Let not these students, finally, entertain an idea, perhaps too prevalent, that there exists towards them any feeling of dislike or contempt, on the part of those who have never passed through an attorney's office. If such a feeling do any where exist, it originates, probably, in a very silly and contemptible jealousy: but, at the same time, let them take care, by cultivating a gentlemanly demeanour, and scrupulous uprightness of conduct, to avoid giving real grounds for a suspicion that they resort to undue means of obtaining business. Not that such cases frequently occur; but there *are* circumstances, which, to ill-natured and less favoured rivals, are susceptible of misrepresentation—food for the bitterest sneers and sarcasms. Let them say with the poet, "our head shall go bald, till *merit* crown it."

It is one thing, and very honourable, to have commenced the career of an attorney's clerk, with the *bond*

fide intention of practising in that department—or visited an office, for a short period, to gain an insight into the course of business; and another, to sneak and skulk into it, with the real but secret design of forming a connexion to supply employment hereafter. It is this latter procedure, only, which excites, as it surely ought, the indignation and contempt, not of the Bar only, but of every honourable member of the profession.

These are the two principal sources from which our third class is filled. The remainder, it would be a needless task to attempt specifying in detail. Some are drafted into the legal from other professions—or even businesses, which they have quitted in disgust, either shortly after entering upon them, or after prosecuting them for years; and who may, perhaps, be best designated as *ὀψιμαθεις*; * a few honourably struggle out of the more obscure ranks of society; and of these, the Bar of the present day is said to contain one or two cheering, and indeed noble instances; others come fresh from the dainty and delicate handling of private tutorage; and very many, after that perilous interval of indecision and indolence which indiscreet parents sometimes suffer to elapse between the period of their children's quitting school, and that of finally settling in a profession. In such cases, it is often an anxious question whether, supposing his age to be somewhere between seventeen and nineteen, a youth should be sent to one of the Universities, or entered at once at an inn of court: a point which should be referred

* "Our good Daniel," said the late lamented Doctor Southey, in his anonymous publication entitled the 'Doctor,' "had none of that confidence which so usually and so unpleasantly characterises self-taught men:"—an acute observation, which some of the individuals alluded to in the text will do well to bear in mind.

to such discreet and experienced members of *both branches* of the profession, as may chance to be accessible to the parent. Dissolute and expensive habits may be as easily acquired at an inn of court, as at the Universities. Generally speaking, it cannot be supposed that any father would hesitate to give his child the unquestionable advantages of a college education, who had the means of supporting him with comfort, not only at, but **AFTER** college. If, however, the *paternæ angustie* must be consulted,—if it become an object to put a son into the way of speedily acquiring a livelihood; then, the sooner he is entered at an inn of court, and settled with a pleader or conveyancer, the better. He may thus, with due industry, be qualified for practice at chambers in three years, and eligible for a call to the Bar in five. The author is inclined to think, upon the whole, after much inquiry and reflection, that the age of seventeen or eighteen is one very eligible for commencing, in these cases, the *practical* study of the profession.

Thus, then, from all these quarters, is collected a miscellaneous throng of candidates for admission to the Bar. Here is the confluence of the streams—or rather, the starting-post, whither—to borrow an illustration from the turf—horses, from all parts, with all characters and pretensions, are collected for a great heat! *We*, however, must turn, for a while, from the exciting and brilliant race-course to the all-important scenes of the **TRAINING**.

CHAPTER IV.

ON THE FORMATION OF A LEGAL CHARACTER.

PART I.—GENERAL CONDUCT.

MAY it be presumed that, of those described in the foregoing chapter, a few, capable of attaining high excellence, but conscious of standing at the threshold of the Bar, with *habits unsettled, characters immature, and education incomplete*, will listen with candour and attention to the suggestions which may be offered, as helps towards the formation of a legal character, before proceeding to what may be termed the strictly *business* portions of this work? Surely something more than aptitude for the acquisition of law learning is to be looked for in him who comes to the Bar with proper feelings and objects—who aspires to become an honour to an honourable profession; one which fills so large a space in the public eye; which is fraught with such heavy responsibilities as conservator of so much that is dear and valuable in society—the property, liberty, life and character of every member of the community; which enables a man to become one of the greatest blessings, or one of the greatest curses, to his fellow-creatures; which—a very Hippomenes to Atalanta—at once

supplies its members with the most ennobling incentives to perseverance in the path of rectitude, and incessant and strong temptations to deviate from it; which affords almost equal scope for the exercise of the best and basest qualities of human nature—for integrity and corruption, for generosity, fortitude, fidelity, as well as “envy, hatred, malice, and all uncharitableness;” capricious, moreover, and often tantalising to its most worthy votaries: well may the student, anxiously and distrustfully pondering all these things, exclaim, *Who is sufficient for them!* Let him not suppose that the above is an over-wrought picture of the profession he has selected: for, to a moderately thoughtful observer, every day’s experience will serve but to corroborate the fidelity of the representation. Numerous as are, and have been, the ornaments of our profession, their numbers would probably have been doubled, had but a correct and comprehensive estimate been formed of it at the outset. Had its candidates but been cautioned against its peculiarly-besetting dangers, fewer would have been deflected from the paths of honour and integrity, or would have rested satisfied with a low tone of moral feeling, or with intellectual mediocrity.

Many, quite aware that the Bar is a learned, forget that it is also a LIBERAL profession; they seem to think it impossible to be lawyers, without being also *mere* lawyers: thus when brought to the brink, hurrying down out of the translucent water, with reptile propensities, into the mire beneath—their congenial element. Such, however, are the appetencies of inferior organisation! *These* are the true pettifoggers! Your mere lawyer is but a pettifogger! and pettifoggers are to be found elsewhere than among the attorneys; however they may contrive to creep into,

with the hope of being at once disguised and dignified by, a wig and gown. Yes, truly—

“Pigmies are pigmies still, though perched on Alps !”

Far better things, however, than these, are hoped of him who is perusing these lines ! He will take special care not to lose sight of the duties he owes to society, in those which he owes to his profession—to himself ; not to forget the heart, in cultivating the head ; not to sink the MAN in the lawyer ! It is, indeed, said of the law, as of metaphysics and mathematics, that it tends to deaden the sensibilities ; but it is not so. It is the undue prosecution of all these pursuits, which is attended with such baneful effects. But when to an exclusive absorbing devotion to the study and practice of the law, is joined a mean, selfish, grovelling character—such a result is inevitable. Can it, however, be said, that these persons *have* a heart to be petrified ?

Thus also it is with the mind. The eye which is able to “inspect a mite,” is also able “to comprehend the heavens :” but a *mole’s* is not so ; and some men bring to the law a mole-eyed mind. They, crawling oft-times from their under-ground darkness, are only blinded by the broad day-light ; they are not formed for coming out upon the open, bright, breezy eminences, and gazing at the diversified prospects of cultivation and refinement ; the glorious realms of literature, art, science, and philosophy, are for ever hid from them,—“dark with excessive bright !”

Far better things are expected, it is repeated, of him who reads these pages. He is not required to bring to the Bar dazzling abilities, the lot of but few ; he is, however, given credit for a frank and manly character. Grant, even, that he has but moderate pretensions to intellect ;

if, nevertheless, he be prudent, reasonable, and teachable, he still has in him, to use the language of an old writer, "the stuff whereof a right worthie lawyer is to be made, so it bee but rightlie worked up;" and by *beginning* well, bids fair to overtake, and end better than very many who have preceded him. The race is not *always* to the swift, nor the battle to the strong, as he will soon find. Let him, then, not despise the friendly and practical cautions which follow !

I.—No profession so severely tries the TEMPER as that of the law—and that both in its study and its practice. *First*, as to its study. The young student is perpetually called upon to exercise calmness and patience, though fretted by the most provoking difficulties and interruptions. He is apt to feel, in a manner, enraged, disgusted, dispirited, when he finds, from time to time, how much he has utterly forgotten, that he had most thoroughly learned; and the increasing difficulties of acquiring legal knowledge, and turning it to practical account: all this, moreover, not in abstract speculative studies, but in those which he must promptly master, because his livelihood is at stake—his whole future lifetime is to be occupied in them. Do all that he can—strain his faculties to the uttermost—approach his subject by never so many different ways, and in all moods of mind, he will nevertheless be sometimes baffled after all; and, on being assisted by his tutor, or possibly even by some junior fellow-student, be confounded to think that so obvious a clue as he is then supplied with, could have escaped him. How often has the poor student, on these occasions, *banged* his books about, and shutting them up, with perhaps a curse, rushed out of chambers in despair ! * How apt is

* There have been instances of even suicide terminating the frenzy sometimes occasioned by unsuccessful law studies.

the recurrence of such mortifications to beget a peevish, irritable, desponding humour, which disgusts the victim of an ill-regulated temper with himself, his profession, and every body about him ! Now let him, from the first, *calculate* on the occurrence of such obstacles, that so he may rather overcome them, than suffer them thus to overcome him. "When you find, therefore, motions of resistance, awaken your courage the more, and *know there is some goode that appeares not* ; vain endeavours find no opposition. All crosses imply a secret commodity: resolve *then* to will because you begin not to will ; and rather oppose yourselfe, as Satan opposes you, or else you doe nothing."* True—legal studies are difficult—often, apparently, insurmountable : but what of that?—DIFFICULTY is a friend ; the best friend of the student, not his enemy—his bugbear ! Hear the philosophic Burke. "Difficulty is a severe instructor, set over us by the supreme ordinance of a parental guardian and legislator, who knows us better than we know ourselves, as he loves us better, too. *Pater ipse colendi haud facilem esse viam voluit*. He that wrestles with us, strengthens our nerves, and sharpens our skill. Our antagonist is our helper. This amicable conflict with difficulty obliges us to an intimate acquaintance with our object, and compels us to consider it in all its relations. It will not suffer us to be superficial. It is," he adds, "the want of nerves of understanding for such a task ; it is the degenerate fondness for tricking short cuts, and little fallacious facilities, that has, in so many parts of the world, created governments with arbitrary powers." "The patient man," says Bishop Hall, "hath so conquered himselfe that wrongs cannot conquer him ; and

* Bishop Hall.—Epist. Decad. V. Ep. viii.

herein alone finds that victory consists in yielding. He is above nature, while he seemes belowe himselfe. * * Hee trieth the sea after many shipwrecks, and beats still at that doore which he never saw opened. * * This man only can turne necessity into vertue, and put evill to good use. He is the surest friend, the latest and easiest enemy, the greatest conqueror, and so much more happy than others, by how much he could abide to be more miserable." * Truly, these are golden sentences, worthy to be ever borne about with the student, as having the virtues of an amulet !

"When thou sittest to eat with a ruler," says the wise man, "consider diligently what is before thee: and put a knife to thy throat, if thou be a man given to appetite." And so, reverently adopting this language, when the student sits down to the study of the law, let him "put a knife to his throat, if he be a man given to" haste and impetuosity of temper.† It will never do. 'Tis no use to

* Characters of Virtues and Vices, b. i.

† "Patience," says old Phillips, "is a necessary ornament of a lawyer. *Virtus contumeliarum et omnes adversitatis impetus æquanimiter portans*; the want whereof is no small disadvantage. * * There is not any passion that standeth more in need of moderation, than doth *impatience*; both because it is one of the frequentest that we are troubled with, and the most unruly, as that which doth bear a sway over the rest, and, of all others, hath the least recourse to reason: and hence it is that the most ignorant are most affected with this passion. *Οι λογισμῷ ελαχίστα χρέμενοι θυμῷ πλείστα δις ὀργήν καθίσταται.* And it doth not only prejudice business; as to carry men inconsiderate to every thing, and put them wholly out of frame, so as not to be able to do any as they could: as Cicero saith, *Semper ira procul abest, cum quæd nihil recte, nihil consideratè fieri potest, nec ab eis, qui adjuvant, probari.* * * But is likewise hurtful to the body; for saith Seneca, *Ira exitus furor est, et ideo ira vitanda est, non immoderationis causâ, sed et sanitatis.*" This one defect, where it gains footing, shall marr all other virtues and parts, be they never so excellent and adorning."—*Stu. Leg. Ratio*. pp. 43, 45.

fume and fidget, and try to enter into its secrets, as the angry housekeeper, who having got hold of the wrong key, pushes, shakes, and rattles it about in the lock, till both are broken and the door still unopened. Take time, eager student;* for there is a time for every thing, even in the law: a time for study, and a time for relaxation. The clearest and strongest eyes, by too long exertion, become over-strained, and every thing is misty and confused. So is it with the mind. You can do nothing *invitâ Minervâ*. Are you foiled, after hours, it may be, of patient thought and research? Quit your books; put on your hat and gloves; take your stick into your hands, and sally forth in search of air, exercise, and amusement, wherewith to recreate your exhausted spirits. After but a brief interval, you will come back in cheerful mood; your head cleared, your temper cooled, and the difficulty, lately so formidable, disappears in a trice! "A man must use his body," says Lord Hale, "as he would his horse and his stomach; *not tire them at once, but rise with*

* "There can be no study without time," says South; "and the mind must abide and dwell upon things, or be always a stranger to the inside of them. There must be leisure, and a retirement, solitude, and a sequestration of a man's self from the noise and toil of the world."—*Sermons*, vol. ii. p. 347.

"Sir Matthew Hale," says Bishop Burnet, "was naturally a quick man; yet, by much practice on himself, he subdued that to such a degree, that he would never run suddenly into any conclusion concerning any matter of importance. *FESTINALENTE* was his beloved motto, which he ordered to be engraved on the head of his staff, and was often heard to say that he had observed many witty men run into great errors, because they did not give themselves time to think, but, the heat of imagination making some notions appear in good colours to them, they, without staying till that cooled, were violently led by the impulses it made on them; whereas calm and slow men, who pass for dull, in the common estimation, could search after truth and find it out, as with more deliberation, so with more certainty."—*Life of Hale*, pp. 86, 87.

an appetite ;" * and this, if it be only for temper's sake, to render the study of the law a pleasure, instead of a plague.

Its practice, *secondly*, by these means will lose many asperities. The young practitioner must not fret at the delay of business: and, above all—not at this trying period only, but throughout his career—oh, let him "beware of JEALOUSY!" "Puisse, Messieurs," said M. Dupin *aîné*, addressing his brethren of the Bar, in 1829, "cette emulation se développer de plus en plus au milieu de vous, mais sans jamais altérer le sentiment de la confraternité! C'est assez vous dire qu'il faut se garder de l'envie: elle rend plus malheureux encore ceux qui l'éprouvent que ceux qui en sont l'objet. L'envie dégrade l'envieux; car il ne fonde son elevation que sur l'abaissement ou l'humiliation d'autrui; tandis que l'émulation, en laissant aux autres tout leur mérite, nous inspire seulement le louable désir de faire encore mieux." †

He that brings to the law a disposition which "pines and sickens at another's joy," an eye jaundiced, a heart blighted with envy,—however great may be his learning, however splendid his talents, will certainly lead the life of a fiend. "The envious man," says Bishop Hall, "feeds on other's evils, and hath no disease but his neighbour's welfare.—Finally, hee is an enemy to God's favours, if they fall beside himself; the best nurse of ill-fame; a man of the worst diet, for he consumes himself, and delights in pining; a thorn-hedge covered with nettles; a peevish interpreter of good things; and no other than a leane and pale car-

* Seward's *Anecdotes*, vol. iv. p. 416.

† Discours pron. à l'Ouverture des Conf. de la Bibliothèque des Avocats. —Thémis, tome dixième, p. 568.

case quickened with a fiend." The torments of the Inquisition will be light and tolerable to those which *he* must endure.

"*Invidus alterius macrescit rebus opimis.*
Invidid Siculi non invenere tyranni
Majus tormentum." *

Oh, 'tis a pitiful, a despicable, a horrid propensity which some have, of going about sneering, detracting, toad-spitting, at their more successful brethren,—“uttering innuendoes cursed” against merit, wherever it shows itself! Do you, reader, ever feel these infernal promptings? Then your soul has been blighted, and is cankering within you. But no, we will not insult you by such a supposition. Strive, if strife be needful, to cultivate a manly, frank, and generous spirit! Do not let your fellows, when they rejoice, rejoice *at your cost*; “joy rather with their joy,”—give the cordial, cheering, sincere look, and ready hand of congratulation, to successful merit, wherever, whenever it appears! Consider, when you see a man rising steadily and rapidly to eminence, how severe and protracted, in all probability, has been his struggle with difficulty: what patient self-denial he has practised—what privation he has suffered—how little of the pleasures of life he has enjoyed—the secret inroads which intense application and unremitting labour may have made upon his constitution—the invaluable assistance which, while himself neglected and unemployed, he has from time to time afforded to his more successful brethren! And if, in addition to this, he be characterised by manly modesty and good-nature—oh, reader, ought you not to sympathise with him—to be proud of your BROTHER? If, at such times, a sudden excruciating twinge *should* be

* Hor. Epist. I. ii. 57, 8.

felt, then say with one of old, "down, down, devil,"—for you may be sure that your greatest enemy is at work within. The victory you thus achieve will be really a glorious one, as the struggle is severe, though secret; and a series of such victories will elevate you into a noble character! *Emulation*—the very life-spring of honourable exertion at the Bar—is thus accurately distinguished by Bishop Butler from the base quality of which we have been speaking:—

"Emulation is merely the desire and hope of equality with, or superiority over, others, with whom we compare ourselves. To desire the attainment of this equality, or superiority, by the *particular means of others being brought down to our level, or below it*, is, I think, the distinct notion of *envy*. From whence it is easy to see, that the real end which the natural passion, emulation, and which the unlawful one, envy, aims at, is the same: namely, that equality or superiority; and, consequently, that to do mischief is not the *end* of envy, but merely the means it makes use of to attain its end." *

But once more. You will sometimes meet with very unreasonable men, both among your brethren and clients, as well in public as in private. A cutting, unkind expression may fall, in a moment of irritation, even from the placid, the patient, the long-enduring Bench; your *leader*, charged with the exciting cares of conducting his case, may treat you sharply—possibly even with rudeness; and your *client*, broiling beneath, may grow testy and unreasonable. All these, undoubtedly, are trying and provoking; but not to him who bears about with him the talisman of an even and well-regulated temper! The author, some time ago, heard a judge in open court utter an

* Sermons at the Rolls. Sermon I. "Upon Human Nature." Note.

extremely severe and uncalled for sarcasm against a very able and well-known counsel. The latter, however, ready as he was, uttered not a word in reply, but fixed upon the judge, for a moment, a steadfast unwavering look,—

“a cold, rebukeful eye,”

and then calmly proceeded with his argument, as if he had not been interrupted. He—the judge—the whole court felt where the triumph was! Suppose, now, instead of exhibiting this admirable self-possession and command of temper, he had flounced about, and entered into an unseemly altercation with the Bench!

Then as to the ill-humour of your senior: really it is surprising, all things considered, that it is so rarely displayed. A manly mind will make allowances for the occasional hastiness, the unguarded expressions, of a man half-beside himself with the anxiety and excitement of conducting an important case in court. A temperate and timely expostulation—a firm remonstrance—will soon set very ugly matters straight; while a snarling, captious, truculent demeanour, will only expose its exhibitant to worse treatment—to merciless contempt and ridicule. It is possible to mistake rudeness for wit, and insolence for spirit. Let the young counsel, if he will, resolve never to submit to a real insult from any man, be he who or what he may—he will be very contemptible if he do; but let him also resolve never to *offer* an insult, or be quick at taking offence. If he do so, if he be such, he will be a fool for his pains, and will meet with a fool's treatment. Conduct yourself with similar discretion and forbearance towards clients. The anxieties and responsibilities which *they* have to bear are very great; the exigencies on

which they consult you sudden, and sometimes even alarming; they are subject to far more numerous and exquisite vexations at the hands of *their* clients, than ever *you* can be at the hands of *your's*—a fact too often quite lost sight of by counsel. Not that you are to assume a cringing, servile, sycophantic bearing, which *they* will be the first to see through, and despise; be you from this “far as the poles asunder.” There never yet was a client either gained or retained by “*hugging*,” as it is termed—by any poking underhand means—who was not a weak, a vain, or a mean man; and who did not, sooner or later, prove himself such. Really respectable attorneys and solicitors are unapproachable by such paltry means. This, however, is a digression.—When you are engaged with clients, be calm, patient, and collected; bear in mind the advice given by Lord Bacon: “Give good hearing to those that give the first information in business, and *rather direct them in the beginning, than interrupt them in the continuance of their speeches*; for he that is put out of his own order will go forward and backward, and be more tedious while he waits upon his memory than he could have been if he had gone on in his own course; but sometimes it is seen that the moderator is more troublesome than the actor.”* Finally, a good temper is an inestimable advantage to a lawyer, old and young; and will carry him, as it were with rail-road ease, comfort, and rapidity, over all obstructions, to the end of his journey; it will lengthen his life, as well as make it happy. A *bad* one will strew his way throughout with thorns,—will convert every one with whom he has to deal into an enemy, and himself, in short, into his greatest.

* Bacon's Essays—of Dispatch.

— “The thorns which I have reaped, are of the tree
I planted. They have torn me, and I bleed !” *

II. The *general conduct* of the law-student is a matter of high concernment, depending upon individual character and tendencies, upon early association—upon discipline and education—or the want of them. It would be a childish and thankless task to dwell at large upon so trite a topic : nevertheless, the author ventures to offer a few practical suggestions—the results of no inconsiderable observation.

First, our profession unavoidably offers very dangerous facilities for DISSIPATION. The reader need not start off under the apprehension of a *sermon* ; but let him bear to be reminded, that every year of his legal life will give him cause to rejoice at, or regret the want of, early sobriety of conduct, and consistency of character. “Pho !” may exclaim a mettlesome young reader, “let me alone for that ! There *are* fish that never swim so well as in troubled waters ; and there are men who compensate for days of hard study by nights of *enjoyment*.” True ; there may, possibly, be a few who succeed in their studies, and even to a certain extent in their profession, in spite of their systematic profligacy ; whose minds have naturally, or have acquired, the power of settling at will upon any subject proposed to them ; whose iron constitutions appear impervious to the drippings of daily dissipation. But do they *never* hear of men breaking down most suddenly and unaccountably in the very prime of life,—in the very moments of success ? The seeds sown in a hard constitution, by debauchery, may be long in germinating—but, alas, when least expected, the baleful crop makes its appearance ; and then the heart aches with remorse at

* Byron.

the revived recollections of early misconduct ; amid the horrors of early decline—of dread consumption—the heart is left to *its own bitterness*,—destitute of hope for the future, or consolation from the past. To say nothing of moral or religious considerations, could the eye of the young law-student be brought to look steadily forward for a few years, and see how heavily his bodily and mental energies will, should his efforts be crowned with success, be taxed in the discharge of his professional duties, how he would *husband* them ! How he would “prepare for a rainy day,” by doing early justice to his constitution !

As for one of the grosser besetments—intemperance—intoxication,—that is now becoming a *vulgar* vice ; a circumstance which will weigh more in the estimation of some than all other considerations put together. How can a man sit down hopefully to his studies, with his system disordered, his temples throbbing, his head swimming, his eyes strained and blood-shot with over-night excesses ? Is this the way to fit a student for his studies ?—to render them easy and attractive ? How can the mind, polluted and choked with associations derived from incessant scenes of riot and excess, “cleanse” itself “of that perilous stuff that weighs upon the heart ?” Passing by the consequences of such conduct upon his own mind, with what mortal peril is it fraught to his character—his reputation ! Is it of consequence to the young counsel to stand well with attorneys and solicitors, and others who are likely to put business in his way ? Then let him beware how he so fatally compromises himself, as to indulge in dissolute habits, which are soon known and noised abroad. Reports of this sort, whether well or ill-grounded, are like water spilled on the ground—not to be gathered up again ! It

is of the last importance to our student to acquire early the character of a steady *working man*. There are undoubtedly persons intending to become law-students, of brisk, lively parts, who think otherwise; who seem to consider it a pleasure and distinction to appear in dandified costume, to mix with dissipated companions, and indulge in debauchery, and this "before settling down to work for life." We shall lay before such worthies, one or two passages which deserve to be weighed by those who would start well in the path which led their forefathers in the law to honour and greatness. "Sir Matthew Hale, on commencing his studies, discarding his gay clothing, assumed a plain and student-like habit."*

"The Lord Keeper Guilford's youthful habits," observes Roger North, "were never gay, or topping the mode, like other Inns of Court gentlemen, but always plain and clean, and showed somewhat of firmness or solidity beyond his age. His desire was rather not to be seen at all, than to be marked by his dress. In these things, towards the other extreme was his aim: that is, not to be censured for a careless sloven, rather than to be commended for being well-dressed."

"The student's habit, likewise," quoth old Phillips, "ought to be decent and neat, not gay and apish: nor may he spend any part of the time allotted for study in a curious and antic dress, which, after all the pains bestowed, doth not become a man. Neither is it only an effeminate

* This, however, he carried to the other extreme, "exhibiting the greatest negligence in his personal appearance; insomuch that on one occasion he was *impressed* as a fit person to serve his Majesty, and was released only in consequence of being recognised by some passing acquaintance."—*Roscoe's Lives of English Lawyers*.

part, but is likewise a sure sign that they are frothy and empty, and accordingly resolved to put a good face upon the matter, and, peacock-like, to place their worth and excellency on their outside;—of whom Seneca saith ‘*Nosti complures juvenes vesti et conda nitidos de capsula totas nihil ab illis speraveris forte, nihil solidum.*’”*

“Sir Matthew Hale,” says Burnet, “was a great encourager of all young persons that he saw followed their books diligently; to whom he used to give directions concerning the mode of their study, with a humanity and sweetness that wrought much on all that came near him; and in a smiling way he would admonish them if he saw any thing amiss in them; *particularly if they went too fine in their clothes*, he would tell them it did not become their profession. He was not pleased to see students wear long periwigs, or attornies go with swords; so that such young men as would not be persuaded to part with those vanities, when they went *to him*, laid them aside, and went as plain as they could, to avoid the reproof which they knew they might otherwise expect.”†

Let the young law-student, above all, be prudent in the selection of his associates, pondering a very striking passage which is to be found in the life of Sir Philip Sidney.

“Algernon Sidney, in a letter to his son, says that in the whole of his life he never knew one man, of what condition soever, arrive at any degree of reputation in the world, who made choice of, or delighted in the company or conversation of those who in their qualities were inferior, or in their parts not much superior, to himself.”

* Stn. Leg. Ra. p. 40, 41.

† Burnet's Life of Hale, pp. 98, 99.

And one scarcely less notable occurs in Roger North's Discourse:—

“The fate of men's lives is too often determined to good or evil, by their company; and as the choice of company is more nice and difficult, so are the hazards of young gentlemen's swinging into utter perdition greater; but a *student of the law* hath more than ordinary reason to be curious in his conversation, and to get such as are of his own pretension, that is to study and improvement; and I will be bold to say that they shall improve one another by discourse, as much as all their other study without it could improve them.”*

Gay life, and gay companions, cannot be kept without *money*: and many are they who have purchased a few months' pleasure, as it is called, with future years of unutterable vexation, and inextricable embarrassment!

Would that some friendly adviser would whisper into the ear of the infatuated young spendthrift—what will you do (if you be unable to command the purse of a family Croesus), *when you come to commence business?* How are you to lay in a library? To take chambers? To keep clerk and laundress? To purchase your annual certificate? To go sessions, or circuit? To *live*, after all this? And what if your health should fail you? What cruel folly thus to embroil yourself at the very outset!

Secondly.—If the student have access to “good society,” let him beware of yielding to its insidious encroachments upon his time and health. If he really work hard during the day, how can he stand, either physically or mentally, the excitement, and consequent exhaustion, of incessant

* Disc. Stu. Law, p. 30.

dinner parties, balls, routs, soirées, concerts, fêtes, and the opera? He will, however, soon find this out for himself; that he cannot long serve two masters, law and fashion; that if he would become a good lawyer, he must drop the *bon vivant* and fine gentleman. It soon gets noised about that Mr. So and So is "a delightful fellow,"—"always out,"—"goes into the best society," &c. &c. &c.; and attorneys and solicitors are too considerate to think of disturbing such enjoyments! Not that the student should morosely exclude himself altogether from cheerful and elegant society, if he have access to it—far, very far otherwise; but there is moderation in all things; a medium between a rake, and a recluse.

Thirdly.—The same prudence which teaches a young man to avoid squandering his hours in pleasure-hunting, will also enable him to preserve a "moderation, discretion, and forbearance, in his very work." Let him economise his time, for the purpose of study, if he will; but let him *apportion* that time wisely. There cannot be an error more egregious than that which is often to be met with in eager law students at the commencement of their studies—that of poring over their books from morning to night, utterly careless of health,—of the means of preserving both body and mind; thus wearing themselves out at the very beginning, "wellnigh chancing shipwreck at starting," as some of our greatest lawyers have had to lament,—and that, too, by unprofitable labour. Let not our student think it a worthy thing to be able to boast of reading "*so many* hours a day,"—eight, twelve—it may be sixteen: whoever, of only ordinary discernment, hears him, will but pity, or despise him, and think very little better of him than if he boasted of being so long em-

ployed in *eating*. Indeed he might as well! Does it never occur to him that mental food as much requires DIGESTION as bodily food? Stuffing and cramming, according to the manner of some, may insure the paining turgidity of an ill-used turkey; but can never conduce to the healthy development and discipline of the human understanding.* Lord Coke's significant words—"præ-postera lectio," the too ambitious student would do well to meditate upon. Five or six hours a day, of thoughtful reading, of real work, will, generally speaking, suffice for the youthful student, unless he mean early to incapacitate himself for prosecuting his studies. *Non quam multa, sed quam multum*, should be inscribed upon his study door. Sir Matthew Hale said, "that he studied sixteen hours a day for the first two years after he came to the Inn of Court, but almost brought himself to his grave, though he was of a very strong constitution, and after reduced himself to *eight* hours; *but that he would not advise any body to so much*: that he thought *six* hours a day, with attention, and constancy, were sufficient;" adding the words already quoted, "that a man must use his body as he would his horse and his stomach, not tire him at once, but rise with an appetite."†

* "I had heard much of ——," said an eminent person to the author, alluding to a young man who had recently entered upon public life,—“and was disposed to think well of him, till I heard him say that for the last four years he had READ *fourteen hours a day*! I have never thought anything of him since. From that time, whatever I have seen or known of him, has convinced me that he spoke truly.”

† Sew. Anec. vol. iv. p. 416. This saying, by the way, is taken by Sir M. Hale from the writings of Bishop Hall.—See Epist. Decad. V. Ep. viii. “The attempts to parcel out a particular period of the day,” says a judicious commentator on Roger North's Discourse, “or a certain number of hours as sufficient for the study of the law, are perfectly nugatory; it is as though a

There is one point, however, concerning the due economy and disposal of his time, which yet remains to be urged most strenuously upon the young lawyer, and that is, **EARLY RISING**. Those who have been accustomed to the enervating habit of lying in bed till nine or ten o'clock, must turn over a new leaf, on entering our profession. To say nothing of business beginning in term time at ten o'clock, and at *nisi prius* (in town) at half-past nine, (on circuit at *nine*) in the morning, and the consequent necessity of dressing, breakfasting, and *preparing* for transacting business,—why will not the student accustom himself to such a habit before-hand? Why not secure an orderly disposition of his time through the day, by beginning it well? A fortnight's perseverance in rising early—say at seven, and eventually at six o'clock, will enable him easily to form a habit which will bring him blessings incalculable in after life. Look at the *time* he will gain by it! Two or three of the very best hours of every day; when he is refreshed both in body and mind,—when all around is silent and peaceful, *provocative* of meditation,—the great glaring world, not yet awoke from *its* slumbers, neither

physician were to prescribe a certain dose of medicine for all his patients, without regard to their age, strength, or constitution. 'Four hours in a morning, close application to his books,' says Mr. North, 'is the sufficient quantum;' while, according to Sir Eardly Wilmot, 'six hours of severe application' is necessary. There are, no doubt, cases in which four hours' study would be more than sufficient, and others in which six hours would not be enough. It is not uncommon to see a man of quick apprehension and powerful memory more effectually mastering the study with a small devotion of his time, than another individual of a duller intellect, whose labours are unceasing. The only mode, therefore, of judging whether a sufficient time is devoted to the study, is by examining the progress made."—*Notes and Illustrations to Roger North's Discourse*, pp. 58, 59, (note 6).—"Sir Henry Finch," says North (p. 8), "used to say, study all the morning, and talk all the afternoon!"

distracting him with its hubbub, nor sending its emissaries to disturb or seduce him ! It will enable him to get through every day's business, however difficult and miscellaneous, leisurely and methodically ; for how true it is, that he who loses an hour in the morning, generally wastes the remainder of the day in running after it ! Not that the student need fasten upon his law-books the moment he rises from bed,—that will be a matter of choice : but to whatever subject he devotes his energies, those energies will be assuredly at their best. Hearken to the cheering and spirit-stirring strains of Milton !

“ My morning haunts are where they should be, at home ; not sleeping, or concocting the surfeits of an irregular feast, but up and stirring : in winter, often ere the sound of any bell awaken men to labour, or to devotion ; in summer, as oft as the bird that first rises, or not much tardier, to read good authors, or cause them to be read*, till the attention be weary, or the memory have its full freight ; then with useful and generous labours preserving the body's health and hardiness, to render lightsome, clear, and not lumpish obedience to the mind, to the cause of religion and our country—liberty, when it shall require our firm hearts in sound bodies to stand and cover their station.”†

This habit of early rising, however, be it observed, will demand the accompaniment of early *retiring*, if it is to be *kept up*, safely, or advantageously. And what of this ! Is it a thing to be regretted ? No, but rather beloved and welcomed as a salutary, peace-giving, blessed necessity !

In a word : if our student have not resolution enough to commence his legal career with early-rising, we see many

* A touching allusion to his blindness.

† Prose Works.

more evils and inconveniences to be encountered by him than *he* does!

Then, again, let the student firmly resolve to abstain from his professional or other labours on the Sabbath-day. We urge not this topic on any religious grounds, those he will find elsewhere than in such a work as this; but purely on those of prudence and expediency. Let him shut up all his books, and put away his papers, on the Saturday night, resolving not to look upon—not to *think* of them (except in rare cases) till the following Monday. *His mind must have an interval of rest*; and this day is set apart for such a purpose, amongst others and higher, with infinite wisdom and goodness. God forbid that the student should be expected to convert this “day of rest” into one of religious *labour*, gloom, and uneasiness. The “Sabbath was made for man, not man for the Sabbath;” but can there be a more just and noble exercise than that of, at least once in the day, attending in the house of the God that made him, and will hereafter judge him,—ridding himself of the distractions, purifying himself from the pollutions of worldly thoughts, and cherishing those of devout hope and thankfulness? Is example necessary? Amongst a “cloud of witnesses” may be cited the illustrious Hale, who “was so regular in the duties of religion,” says Burnet, “*that for six-and-thirty years’ time he never once failed going to church on the Lord’s-day.*”

Nor let the student rob himself of the salutary leisure afforded by holidays and vacations. It is but a short-sighted policy to do so, with reference equally to his mind and body. He will do infinitely more, and that more pleasantly, after a week or a month’s complete intermission of

his studies, than he would gain by devoting all the vacation to them. *Ne quid nimis* should be rung in his ears daily by those who have access to an over-labouring student. They should address him in the weighty words of "the English Seneca" (Bishop Hall):—"Moderate your own vehemencie; suffer not yourselfe to doe all you could doe: rise ever from your deske, not without an appetite. The best horse will tire soonest, if the reins lie ever loose on his necke: restraints in these cases are encouragements: obtaine therefore of yourselfe to deferre and take new daies. How much better is it to refreshe your mind with many competent meales, than to buye one day's gluttonie with the fast of many? And if it be hard to call off our mind in the midst of a faire and likely flight, know that all our ease and safety begins at command of ourselves; he can never taske himselfe well, that cannot favour himselfe. *Persuade your heart that perfection comes by leisure*—the rising and setting of many sunnes (which you think slackens your worke) in truth ripens it. That gourd which came up in a day, withered in a day; whereas those plants which abide age, rise slowly."*

III.—AMBITION! what shall be said of it?—That the first fruits of a legitimate *professional* ambition, will be the patience, sobriety, and steadfastness of which so much has been already said. If it beget not *these*, it will be all moonshine—the mere will-o'-the-wisp that has led thousands out of their way into the dreary bogs and marshes of failure,—there to sink

"Unseen, unpitied, hopeless!"

True legal ambition is an eminently calculating and prac-

* Bishop Hall, Epist. Decade V. Ep. VIII.

tical quality. It disposes the student to apportion his strength to his task ; to set his eyes upon worthy objects, and go about the attaining them, worthily—to look, before he leaps. It deals with matter-of-fact alone, utterly discarding any reliance on *chance*—a word which is banished from its vocabulary. It sets a fool speculating on possibilities ; a wise man calculating probabilities. The one thinks, with vain sighs and wishes, on the *end* alone ; the other does but glance at it—and then resolutely sets about considering the *means* : the one it makes passive, the other active. It is, in short, the balance-wheel in the well-regulated mental mechanism ;—a mere disturbing force in one ill-regulated. If the most eager and gifted of its votaries should deign to ask *us* for a suggestion, we would earnestly whisper in his ear—“Be calm ; calculating ; long-sighted ; think not of hop, step, and jump, in the law, but rather gird up your loins for a severe struggle—a long pilgrimage ; for the prize is very splendid, but very distant. You cannot hasten the order of things, the march of events, any more than the husbandman the course of vegetation. However anxious for his crops, however rich the soil, however propitious the weather, he must drop his seed into the ground, and wait and watch till it make its appearance in due season.” So is it especially with the legal husbandman !—Learn your profession thoroughly ; do not attempt to become, as Lord Bacon has it, “a lawyer *in haste*”—the thing is impossible ; learn slowly and well that which will so enable you to acquit yourself brilliantly when “the occasion sudden” shall have arrived. A contrary method will mar all your prospects, rendering you turgid with conceit and presumption, and inflaming your friends with most fallacious expect-

tations.—“But,”—murmurs an impetuous spirit—“look at the heights to be scaled—the ground to be gone over: nothing but desperate efforts will suffice.” Did he ever witness a great race? Did he see the noble horses, when brought to the starting-post, and the signal was given, plunge off at their top speed? Or did he not rather observe how slowly, cautiously, and skilfully their riders managed the start, so as to put their horses *gradually* to their utmost, that they might so be able to shoot with lightning-swiftness past the *goal*?

The study is a vast and difficult one, truly: so the cable looked fearfully thick, inextricably twisted together; and yet a very little mouse nibbled through it, and soon set the great ship a-drifting!

These may seem illustrations, common-place enough; nevertheless it is all we have to say upon Ambition except to conclude in the words of a very great man—himself one of the most glorious models of a true ambition—when you contemplate and emulate the greatness achieved by another, consider the greatness of his efforts and sacrifices “Remember; resemble; persevere!”*

IV.—Ambition, such as we have endeavoured thus plainly to pourtray it, cannot fail of generating another capital quality of a promising law-student—DECISION OF CHARACTER, and that both in intellectual and moral matters. No genius, no industry, no energy, will avail without *this*—especially in the legal profession. The student may, perhaps, select his course wisely—but how difficult to *adhere* to it—through good and evil report—through all doubts, obstacles, and discouragements! The fruit of his labours is so slow in appearing, the toil so

* Burke—of Lord Rockingham.

incessant and severe, that the stoutest-hearted student is apt to grow a-wearied, and begin to waver from his purpose. He hesitates. *Is* he in the right, or, at all events in the *best* way? Is he not wasting his time?—throwing away his labour?—He begins to slacken, pause, and look about him. How did So and So manage? he wonders—what would Such a one recommend? He consults one, and another; hears of a new course of study; several of his acquaintance say there is nothing like it; *he* is quite in the wrong, he may depend upon it! The celebrated ——— took *this* method! Our poor fickle friend listens and sighs. Forthwith the vessel tacks—and tacks—and sails this way, and that way, till the daylight is gone, and the port further off than ever! Let the student, now, be early on his guard against this wretched frailty of purpose—this hesitating, fluctuating humour; and if he cannot overcome it—quit the law.

Priusquam incipias, consulto, et UBI CONSULUERIS, MATURE FACTO, opus est,—must be his maxim. Let him reflect upon the disposition young men have to laud, at the expense of all others, the particular course of study which *they* have adopted, caring not whether or not they have been really successful or not; never thinking, in this blind flattery of their own superior discernment, of the difference between intellects, which, like different soils, require different modes of cultivation! Let the student deliberate as long as he chooses, before adopting his line of study—but, once fairly adopted, let him make a point of adhering to it with manly firmness; unless, after a reasonable trial, it prove to be an erroneous one. Let him not go gadding, flitting, and gossiping about among his friends—plaguing both them and himself with asking their

opinions on what he is doing, but "pursue the even tenor of his way," and in due time he will assuredly reap a rich harvest. "But," he says, "I admire all this; I see its necessity—would I could put it in practice:"

— Video meliora, proboque ;
Detiora sequor !

Let him, however, rely upon it, that the knowledge of the disease being half the cure, the more sensible he becomes of his deficiency, the more he must strive to supply it. A series of these efforts will beget the habit—*Vires acquirit eundo*. Consider how all-important it is. What can be done in the business of life without it? Is it not worth *daily* struggles to acquire it? Why will he let his escutcheon be tarnished with this unseemly blot, when a few hard rubbings will get it out?

The flighty purpose never is o'ertook,
Unless the deed go with it : From this moment
The very firstlings of my heart shall be
The firstlings of my hand. And even now
To crown my thoughts with acts, be it thought done !*

It is needless, however, to attempt pursuing this important subject further, since it has been handled with signal ability by the late Mr. Foster: whose essay on "Decision of Character" the student is recommended to read with earnest attention. It is full of just and stirring thoughts—of acute and sagacious observations; and several individuals, now variously distinguished in life, have been heard by the present author to express their fervent obligations to Mr. Foster, for the high and healthy tone which the Essay in question communicated to their youthful character.

* Macbeth.

Lastly, let the young student be early impressed with the certainty of one fact—that if he desire to attain to the dignified distinctions of office, whether judicial or otherwise, so coveted by the successful practitioner at the Bar, he must preserve, from the beginning to the end of his career, a character honourable and virtuous in the eyes of the profession, and of the public. He must manifest, on all occasions, especially in the conduct of business, that conscientious, rigid, and inflexible regard for TRUTH, which will not admit of loose, incautious statements, on even the most ordinary or trivial occasions. A short-coming in this respect is soon detected by both the Bar and the Bench: and the moment that a man's representations, in addressing the court, are received with *distrust*—whether visibly manifested or not—whether in respect of intentional misrepresentation, or of rashness, carelessness, or thoughtlessness—he here does himself an injury which is absolutely irreparable. A thousand occasions, both great and small, arise in professional intercourse at the Bar, in which each party must rely implicitly on his opponent's honour and veracity. Let a gentleman once find himself *deceived*—let one or two more experience a similar fate—and he who has occasioned it becomes a marked man—“*niger*” is inscribed on his back—“*hunc tu caveto*,” is whispered whenever his name is mentioned. The authorities he may cite, are distrustingly received by his opponents: so are the affidavits, whose contents he is stating to the court—and if detected in a single slip, he is instantly and severely exposed and rebuked. Besides a reputation for this strict veracity, a member of the Bar must be of a frank and honourable character and bearing, incapable of taking mean advantages of any sort. If he be otherwise, it will

quickly be discovered—and as quickly known to all persons engaged in practice—and with the like fatal consequences as in the former case. There is, in fact, perhaps no profession—not even the church—where integrity and high-mindedness *tell* so early and decisively upon a man's character, position, and prospects in this life, as at the Bar. Look at the innumerable occasions which exist for the employment of a thoroughly *trust-worthy* member of the Bar in critical and responsible public duties, of a temporary, as well as permanent nature. Whenever such an exigency arises, see what a number of persons there are from whom to make the selection: the *judges* are asked "What do you think of Mr. such a one?" The eminent members of the Bar are asked similar questions: and the answer is decisive. "*Will he do?*" A silent shrug is—decisive! There have been instances of splendid talents and acquirements unhesitatingly and perseveringly disregarded—because their possessor's integrity could not be implicitly depended upon—because even, without any specific and well-founded imputation upon it, there was a prevalent *impression* to its disadvantage. This impression may be generated by the perception of a number of little traits and circumstances, of which he who is at once the subject and the victim of such observation, is quite unconscious. If, for instance, he be addicted to immoral and profligate conversation—if he openly indulge in a dissolute course of life—if he be, in the slightest degree, chargeable with recklessness and unconscientiousness in money transactions—if he evince a palpable disregard of, or contempt for religion, and its ordinances;—all of these, and each of them, will inevitably produce its effect in quarters not dreamed of by their unfortunate exhibitant. A spotless

character, on the contrary, will often elevate its possessor, though enjoying a very moderate reputation for talent or learning, to high and distinguished posts, with the approbation of the profession, and of the public. No apparent popularity at the Bar can supply the want of its respect and esteem. Thus it is; thus it ever has been; thus it ever will be; thus it ever ought to be. It is, perhaps, needless to say that these observations happily receive but rare illustration by actual occurrences, extensive as is the profession of the Bar, and miscellaneous as are the characters necessarily admitted into it: but why is this so? because such considerations are ever present to an honourable mind, both before and after entering the profession of the Bar; and even to a mind of a very low tone of moral feeling, the observance of such requisitions becomes indispensable as a matter even of mere *policy*. Hypocrisy, it has been said, is the homage paid by vice to virtue.

Thus has it been attempted, briefly, and, it is feared, very imperfectly, to sketch a few of the principal features of what may be termed the moral portraiture of a young lawyer. Whatever may be thought of its deficiencies, it is the product of sincerity, and that conviction of its truth, which is guaranteed by many years' attentive observation of life and character. The supercilious and self-sufficient may, if they please, ridicule that which will be certainly received, however, as it is designed, by a manly, a modest, and a candid reader.

CHAPTER V.

ON THE FORMATION OF A LEGAL CHARACTER.

PART II.—GENERAL KNOWLEDGE.

SECTION I. HISTORY—POLITICAL AND MORAL PHILOSOPHY—METAPHYSICS— POLITICAL ECONOMY—AND LOGIC.

THE engrossing nature of legal pursuits, whether in study or practice, is too apt to render those who undertake them indifferent both to the acquisition and retention of that general knowledge, that large acquaintance with men and things, which is essential to constitute a superior member of society, especially of so important and conspicuous a profession as that of the Bar. Against this, then, let the student be ever on his guard. The considerations are numberless and most weighty by which this topic might be urged upon him. Let him assure himself, that the longer the acquisition of such knowledge is neglected, the more difficult will be the remedy, more poignant his regret, more frequent his exposure to mortification; while an early, systematic, and prudent cultivation of it, will insure him numerous and often overwhelming advantages over those who have not thought it worth their while to adopt a similar course. As far as elegant literature only is concerned—does he imagine that he is

to be for ever in chambers, or in court,—eternally writing opinions, drawing pleadings, and preparing and delivering arguments? Then we have done with him, as one of those dismal plodders who are past praying for,—mere legal beetles, ever crawling amidst the duskiest passages of an Inn of Court! How can a man of this description venture into superior society? He must *there* either talk the slang of his profession, or be condemned to total silence: for what does he know of its topics?—of foreign or domestic political movements?—of the varied and interesting details of literature, scholarship, the fine arts, science, philosophy? Excuse may be made for him, by good natured people, on the score of an overwhelming practice, which leaves him neither time nor inclination for other pursuits; but, making the largest allowances, will they avail to ward off the contempt which must ever attach to *blank* ignorance of all such matters? What, however, if this lawyer be found to have, after all, but a *moderate* practice! Then the excuse plainly holds not; for that must be a mean and narrow mind indeed, which is choked up with so little. It is true that, as before intimated, a tolerably extensive sweep of useful practical knowledge—*i. e.* of the details of trade, manufactures, commerce, &c. &c.—must be possessed necessarily by even the *mere* lawyer, who has no chance whatever of attaining to eminence; but can an intellect of any except of the most grovelling description rest satisfied with *this*? What Burke said of Mr. Grenville—two men in this respect the very antipodes of each other—is worthy of being borne in mind by every young lawyer, be his pretensions at starting what they may.

“ Sir, if such a man fell into errors, it must have been

from defects not intrinsic; they must be rather sought in the particular habits of his life; which, though they do not alter the ground-work of character, yet tinge it with their own hue. He was bred in a profession. He was bred to the law; which is, in my opinion, one of the first and noblest of human sciences,—a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalise the mind exactly in the same proportion. Passing from that study, he did not go very largely into the world, but plunged into business,—I mean into the business of office,—and the limited and fixed methods and forms established there. Much knowledge is to be had, undoubtedly, in that line; and there is no knowledge which is not valuable. But it may be truly said, that men too much conversant in office are rarely minds of remarkable enlargement. Their habits of office are apt to give them a turn to think the substance of business not to be much more important than the forms in which it is conducted. These forms are adapted to ordinary occasions; and therefore persons who are nurtured in office do admirably well, as long as things go on in their common order; but when the high roads are broken up, and the waters out,—when a new and troubled scene is opened, *and the file affords no precedent*,—then it is that a greater knowledge of mankind, and a far more extensive comprehension of things is requisite than ever office gave, or than office can ever give.” *

* Speech on American taxation.—“This is a lively picture of the insufficiency of mere experience,” says Dugald Stewart, “to qualify a man for new and untried situations in the administration of government. The obser-

It cannot be too frequently impressed upon those who, before embracing the legal profession, have laid the basis of extensive general knowledge, or rather, dropped the seeds of it into their minds, that it is infinitely easier to leave them to perish—to forget all, than difficult to retain, improve, and expand present knowledge. True it is, that

“ Quo semel est imbuta recens, servabit odorem
Testa diu ;”

but that applies chiefly, if not exclusively, to the classical and mathematical studies with which they have been occupied from their earliest years ; which are intrinsically of little other use than to adorn and strengthen the mind, and therefore valuable only as means to an end, to those especially who enter the law. It may be vain to think of preserving an exact recollection of the *minutiæ* of scholarship*—the critical niceties of grammatical construction,

vations he (Mr. Burke) makes on this subject, are expressed with his usual beauty and felicity of language ; and are of so general a nature, that, with some trifling alterations, they may be extended to all the practical pursuits of life.”—*Philosophy of the Human Mind*, chap. iv. § 7.

* There are occasions, however, when such knowledge is not only highly desirable, but absolutely indispensable in the actual business of the Bar. Take for instance a case, tried at Guildhall, in which the author a few years ago was engaged as junior counsel—his leader, a gentleman now occupying a very eminent official post. It was an action by the proprietor of a classical school against a gentleman, for his son's schooling ; and was resisted on the ground that the master was incompetent to teach the classics—a defence which was specially pleaded, and rendered necessary an inquiry into the manner in which Greek and Latin exercises had been corrected—in respect of prosody, syntax, and translation from the Greek, Latin, and English respectively into each other ! The plaintiff came prepared to defend, and the defendant to impeach the sufficiency of the teaching, in detail. How ridiculous would have appeared, on such an occasion, an inadequate acquaintance with such matters ! Nay—might not the mortifying necessity have been imposed on a leading counsel of returning the brief, on the ground that he was incompetent to hold it ! What other remedy was there for it !

dialect, and prosody: but are all the traces, therefore, to fade away, of ancient poetry, criticism, history, biography, philosophy? The sublime strains of Homer, Æschylus, Sophocles, Euripides, to be so soon utterly forgotten? The *thought* is sufficiently shocking; but, nevertheless, the *result* inevitably is so, where a man is ingrate enough to be at no pains about the matter,—who will not set apart a little time—a few occasional hours—to refreshing converse with his early favourites.* He could not have loved truly, that can part so easily. If it be but once or twice in a month even—that our student can shut his door upon the hubbub of his profession, of the world, and enter into communion with the great ones of antiquity, the interview he thus secures will indeed be precious. It will be like touching the harp which long ago had charmed him in a distant paradise, reviving a thousand pure, tender, and ennobling recollections of those days,

“ When the freshness of thought and of feeling were his,
As they never again can be.”

And as for the sterner studies of algebra and geometry, these will be, in a manner, *functi officio*; they will have disciplined and strengthened his understanding: but is it

* “ADAMS’S ROMAN ANTIQUITIES,” by the way, is one of the very last books which a classical scholar (especially if he have not been blessed with a first-rate classical education) should lay aside on entering the legal profession. He should make a point of reading portions of it at stated intervals, and thus preserve fresh in his mind that excellent writer’s solutions of the principal difficulties and obscurities which are to be met with in Latin literature,—those recondite allusions to habits, manners, and customs, which soon slip from the recollection, and yet are essential to the understanding and full appreciation of any Roman writer, either of prose or poetry. The chapters on “*Law*,” and “*Judicial proceedings*,” should be objects of special attention; as well as the corresponding portions of “POTTER’S GRECIAN ANTIQUITIES.”

nothing to part for ever with the only keys that can unlock the grand storehouses of physical science?—as will inevitably be the case, unless the “fundamentals of philosophy be *oft re-visited*.” Perhaps, however, it may be safely taken for granted, that those who have been happily thus early initiated into classical and philosophical pursuits, and possess, besides, minds naturally capacious, retentive, and inquisitive after truth, will never suffer themselves to be *enslaved* by any one pursuit, even though it be that in which are embarked all their hopes of future greatness.

But what shall be said to those, less favoured by opportunities than perhaps by nature, who bring to our profession minds comparatively undisciplined and uninformed? It is a difficult and delicate task to advise them; for “*some travellers*,” says Bishop Hall, “*have more shrunk at the map than at the way* : between both, how many sit still with their arms folded?” Nothing is easier than to draw up a flourishing list of books, and style it a “course of reading;” nothing more disheartening than such an array, to those for whose eye it is designed. The most enterprising young reader’s heart is apt to sicken at the sight of a “course of studies,” however skilfully sketched out; there seems something hopeless in having to master so much,—in seeing the work of many years to come thus cut and dried, and parcelled out before him. But how must he have despaired at the fearful catalogue of “books to be read,”—traversing all parts of moral, intellectual, physical, and mixed science,—“before settling to the study of the law,” which are to be found in not a few of those works which are styled elementary! What does the astounded *legal* student think of being told, in

the inspiring general terms following,—taken from an extant work on legal studies,—“to acquaint himself with chemistry, botany, anatomy, physiology, medical jurisprudence, logic, mathematics, history, geography, and moral philosophy!” Would the intellect of a Bacon, added to the age of a Methuselah, be more than equal to such a task?*

The author, after making such observations as these, ventures, only with the sincerest deference and hesitation, to lay before the reader, who modestly feels conscious of the necessity of such assistance,—and who either has not the means of consulting abler advisers, or (with possibly a natural pride) feels reluctant orally to acknowledge to another the extent of his deficiencies, a few plain suggestions for a useful and *practicable* course of general studies. Let the author, however, at the outset impress upon the eager student, that *it is not to be hurried over in a few months, but must be the work of several years' attentive and systematic reading and reflection.* “Nothing, in truth,” says

* As a curious specimen of such a catalogue, the author cannot resist giving the following extract from a work entitled “Suggestions for the Education of SOLICITORS and ATTORNEYS !” After giving lists of books on General history, English history, Belles Lettres and composition, our author proceeds thus:—“In the study of natural and experimental philosophy, Lobb’s Contemplative Philosopher, Joyce’s Letters on Natural Philosophy, Enfield’s Institutes of Natural Philosophy, Gravesande’s Mathematical Elements of Natural Philosophy ; Hooper’s Rational Recreations, and Desagulier’s Experimental Philosophy, are of essential advantage ; and in the pursuit of abstract and metaphysical philosophy,”—*six* great works are cited as “worthy of most attentive perusal.” “In moral and political philosophy,”—*four* extensive works are mentioned ; in “astronomy and mathematical learning,”—*eight* works (among which is La Place’s System of the World) ;—and so “in the arts,” “in political economy,” “in religion and morals,”—all which, we are told, “claim the attention of every person who wishes to gain respect and attention among the well-educated classes of society.”—*William’s Study of the Law*, pp. 206-7. This is pretty well !

Dugald Stewart, "has such a tendency to weaken, not only the powers of invention, but the intellectual powers in general, as a habit of extensive and various reading, *without reflection*. The activity and force of mind are gradually impaired, in consequence of disuse; and not unfrequently all our principles and opinions come to be lost in the infinite multiplicity and discordancy of our acquired ideas. It requires courage, indeed (as Helvetius has remarked), to remain ignorant of those useless subjects which are generally valued; but it is a courage necessary to men who either love the truth, or who aspire to establish a permanent reputation."* Nor must general reading be suffered on any account to interfere with legal studies, but be kept in due subordination to them.—The spirit in which the student should commence his labours, must be that described by Lord Bacon, in words which the student should ever have present in his mind: "Read, not to contradict and confute, nor to believe and take for granted, nor to find talk and discourse, but to **WEIGH AND CONSIDER.**"†

We shall set out with stating to all *whom it may concern* (though it will excite a smile on the faces of many) that he who comes to the Bar, aiming at practice in open court, without a competent knowledge of the **LATIN** and **FRENCH** languages, will run the risk of being often placed in a terribly mortifying position. References are so often made, *vivâ voce*, to authors who wrote in Latin, and Norman-French, and discussions raised on the true construction of such passages;—so many old charters, deeds, &c., are produced in court for examination and comment—and there

* Elements of the Philosophy of the Human Mind, Part II. c. vi. § 5.

† Bacon's Essays—Of Studies.

are so many occasions, principally at Nisi Prius, where (in the case of French documents and witnesses) a knowledge of modern French, and of its proper *pronunciation*, is requisite,—that deficiencies in these respects had better be supplied as quickly as possible. With respect to Latin—a false quantity is a very sad business at the Bar. A “*Nolle prosèqui*,” or [horrescimus referentes!] “*audita querèla*”—excites a sensation which, as one or two can testify to their cost, does not soon subside.

We would also call the student's attention to another matter, often overlooked, but which he will very soon find to be of much importance—viz., acquiring a familiar knowledge of the mode of writing, as to abbreviations, &c., adopted in ancient times—as exhibited in old charters and other instruments. Very frequently these puzzling old documents are produced in court, written sometimes in Latin and sometimes in French, in such a crabbed style of writing, and with such innumerable abbreviations of technical terms, themselves long since grown obsolete—as renders it a matter of great difficulty, even to experienced persons, to decipher them at all—still greater to comprehend their exact meaning. There are persons in the neighbourhood of the Inns of Court who devote themselves to this peculiar department—and it has often occurred to the author that a few guineas would be well expended in taking lessons of them.

Let us also, before quitting this topic, add a word or two upon another—addressed to those who may enter the profession from the comparatively humbler ranks of society:—the absolute necessity of acquiring a gentlemanlike style of address and elocution, and *correct pronunciation*, if they desire to avoid occasioning a blush

to their surprised and mortified clients, and public discredit to be brought upon the Bar, and bitter ridicule upon themselves. Let them consider the highly educated talent which will surround them whenever they rise to speak either to the judges, or a jury—the acute members of the press (frequently excellent scholars), who report what he is saying—and the competent critics among the curious public, who are ever to be found listening to the proceedings of a court of justice. No efforts can possibly be too great to get rid of any taint of vulgar pronunciation, whether of *Cockneyisms*, or provincialisms. If the young reader could catch but a glimpse of the contemptuous smile and titter with which an occasional outrage of this sort is greeted, he would pause long before running the risk; and if it should be his fate to encounter it, he may *then*, perhaps, recollect his perusal of this page, and regret his disregard of its friendly caution.

It cannot be supposed that any come into the profession destitute of the early advantages of a liberal education, especially as far as relates to the *rudiments* of geography, and chronology and history, ancient and modern,—matters which, as Mr. Dunning observed, it is “*not so much a credit to know, as a disgrace to be ignorant of.*” One conscious, however, of his deficiencies on this score, and of the little time left him for supplying them, must make a point of frequently exercising himself in these matters; and for this purpose should not disdain the assistance afforded by works of a very slight elementary character, and of which a great number are extant and easily accessible. A very little occasional exercise will suffice to keep the leading lineaments of many important branches of knowledge fresh and distinct.

The attempt to read HISTORY without a close attention to, or rather, a fair previous knowledge of, *Geography* and *Chronology*, may be said to be almost farcical; and an imperfectly educated student must set himself in right earnest, at his earliest leisure, about the acquisition of such knowledge. One of the most useful works which can be recommended on the subject of GEOGRAPHY is that on *Ancient and Modern Geography*, by the late Bishop of Lichfield, Dr. Butler, for many years the distinguished head-master of Shrewsbury School: and of which a new edition, revised by his son, appeared in 1843.—The same author's *General Atlas* of Ancient and Modern Geography should also be procured and diligently studied. For CHRONOLOGY, the student is recommended to the little volume published by Sir Harris Nicolas, entitled "*The Chronology of History*." This is, indeed, a treasure in itself—a worthy "Hand-book of History,"—and contains within a very small compass, and in a portable and convenient size and form, information of the greatest value, compiled carefully from a variety of authentic sources—particularly that splendid monument of learning,—"*L'Art de vérifier les Dates*," and "*De Vaine's Dictionnaire Raisonné de Diplomatique*."

The author makes no apology for transcribing into the text an instructive paragraph from the preface of this excellent work; and he recommends the young historical student to ponder that paragraph:—

"Though the value of chronology, as one of the great land-marks of history, is generally admitted, the principal branch of that science—the reduction of the different eras, and other epochs by which time was formerly computed, to the present mode of calculation, has not received the atten-

tion in this country which its importance demands. Every event in history arose from, and depended in a great degree upon, *some preceding circumstance*, and became, in its turn, the parent of other events, of greater or less moment ; hence, however trifling either of them may be in itself, or if viewed without relation to other circumstances, however immaterial the precise *time* of its occurrence, there are few which, as tributary streams to the great current of human affairs, had not some influence on the political state of the nation in which they took place, and not unfrequently also on those of neighbouring countries. To know that any event *did* occur, is of little use for the legitimate objects of history ; the utility of which is, to trace transactions to their causes, and, when these are known, to discover their general consequences. Abstractedly, even the greatest events of modern or ancient history deserve little consideration. What would it matter, for example, to posterity, whether the battle of Waterloo was or was not fought, much less the precise day and year when it occurred, were it not that it is the first link of a long chain of events, the importance of which on Europe, and, indeed, on the whole civilised world, it will be the province of future historians to describe ? Hence arises the value of chronology ; for a mistake in the date of that victory might induce an historian, some centuries hence, to confound cause with effect, by supposing that Napoleon's second abdication preceded, instead of being the result of that battle. If, then, history should be studied as a science, that mankind may know from the past what to expect from the future, it necessarily follows that all the facts which history records ought to be referred, with mathematical precision, to their proper dates : for if one

of them be misplaced, the inference drawn from it will be founded on false premises. Chronology and geography have been justly called the 'eyes of history,' without the lights of which all is chaos and uncertainty. But perhaps a better simile would be, that dates are to history what the latitude and longitude are to navigation—fixing the exact position of the objects to which they are applied."*

HISTORY must be one of the earliest objects of a young lawyer's attention.† Sir William Jones has some very valuable and beautiful observations on the necessity of such knowledge to a student of the law.

"There is no branch of learning from which a student of the law may receive a more rational pleasure, or which seems more likely to prevent his being disgusted with the dry elements of a very complicated science, than the history of the rules and ordinances by which nations eminent for wisdom and illustrious in arts have regulated their civil polity: nor is this the only fruit which he may expect to reap from a general knowledge of foreign laws, both ancient and modern; for whilst he indulges the liberal curiosity of a scholar, in examining the customs and institutions of men whose works have yielded him the highest delight, and whose actions have raised his admiration, he will feel the satisfaction of a patriot, in observing the preference due, in most instances, to the

* Chronology of History, preface, v. vi.—See also Locke on Education, § 182.

† "The student of politics or public law," says Lord Woodhouselee, in a work which will be found (*post*, p. 149, *et seq.*) strongly recommended to the reader, "is presumed to have that previous acquaintance with history which it is the object of a course of historical study to communicate; and without such acquaintance, his study of politics will be altogether idle and fruitless."—Universal Hist. vol. i. p. 4.

laws of his own country, above those of all other states ; or if his first prospects in life give him hopes of becoming a legislator, he may collect many useful hints for the improvement even of that fabric which his ancestors have erected, with infinite exertions of virtue and genius, but which, like all human systems, will ever advance nearer to perfection, and ever fall short of it. In the course of his inquiries he will constantly observe a striking uniformity among all nations, whatever seas and mountains may separate them, or how many ages soever may have elapsed between the periods of their existence, in those great and fundamental principles which, being clearly deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration, by any change of place or time ; nor will he fail to mark as striking a diversity in those laws which, proceeding merely from positive institutions, are consequently as various as the wills and fancies of those who enact them." * Before entering upon the details of a course of Historical Study, it may be well to bear in mind a judicious observation by the author of a useful little work on the Feudal System, which has just (1844) been published :—"The usual method of distributing historical events under the reigns of the Sovereigns in which they occurred, has its advantages : but is, nevertheless, likely to encourage the idea, *that the events of any one particular reign form a complete series*—having little or no connection with those which precede, or with those which follow. History, however, is most profitably studied, when it is used as the exponent of the condition of mankind—tracing the origin and progress of its most important institutions ; of education, of science, and the

* Prefatory Disc. to the Speeches of Isæus.

useful arts—of commerce, of the fine arts, and of the political and domestic relation of the people; where, in short, it follows, and clearly defines the progress of civilisation.”*

Since the publication of the former edition of this work there have appeared several important additions to historical literature, to two of which the student's attention may be advantageously directed—Professor Smyth's Lectures on Modern History, and the late Dr. Arnold's Lectures on History. The former are the lectures delivered by their gifted author during the period of thirty years, while he was Professor of Modern History in the University of Cambridge; and of which more will be said when we arrive at that branch of the subject. The latter is the production of the late distinguished Head Master of Rugby School; and is a work characterised by an independent and philosophical spirit, containing many just and valuable lessons on the true uses of history; with, at the same time, a very decided bias in favour of what are generally designated as “liberal” principles. Bearing in mind this latter consideration, the student is referred with confidence to the work in question.

Of all the works which have fallen under the author's notice, the one which appears to him, after a long familiarity with it, best calculated for the student, as the basis of a sound and comprehensive course of historical study, is one which was first given to the public in a complete form in the year 1834, under the name of “*Universal History from the Creation of the World to the beginning of the 18th Century*,” viz., till the death of Peter the Great, in 1724, by the late titular Lord of Session, LORD WOODHOUSELEE, Alexander Fraser Tytler. This work, an ex-

* The Lord and the Vassal.—Introd.

pansion of its author's popular "*Elements of History*," "comprehends the whole course of lectures on that subject, delivered by its author, while Professor of Civil History, and Greek and Roman Antiquities, in the University of Edinburgh," and was the object of his "constant attention for thirty years, during the greater part of which period it received an annual revision." It is published in a very convenient form, in six small pocket 12mo. volumes; and owing, it is believed, solely to the excessive number of copies of it which were printed, may now be obtained for a mere trifle. The author strenuously and confidently recommends this work to the student. It is written very accurately and elegantly; is excellently arranged; and though necessarily greatly condensed, yet not to such an extent as to impair its interest, or render unpleasant a *continuous* perusal. The plan of the work is thus explained by its accomplished author :—

"When the world is viewed at any period, either of ancient or of modern history, we generally observe one nation or empire predominant, to whom all the rest bear, as it were, an underpart, and to whose history we find, in general, that the principal events in other nations may be referred from some natural connection. This predominant nation I propose to exhibit to view as the principal object whose history, as being, in reality, the most important, is, therefore, to be more fully delineated; while the rest, as subordinate, are brought into view only where they come to have an obvious connection with the principal. The antecedent history of such subordinate nations, will then be traced in a short retrospect of their own annals. Such collateral views, which figure only as episodes, I shall endeavour so to regulate, as that they shall have no hurtful

effect in violating the unity of the principal piece." * * * "Thus Ancient History will admit of a perspicuous delineation by making our principal object of attention, the predominant states of Greece and Rome, and incidentally touching on the most remarkable parts of the history of the subordinate nations of antiquity, when connected with, or relative to, the principal object." * * * "In the delineation of MODERN History, a similar plan will be pursued: the leading objects will be more various, and will more frequently change their place; a nation, at one time the principal, may become for a while subordinate, and afterwards resume its rank as principal; but uniformity of design will still characterise this moving picture; the attention will be always directed to the history of a predominant people; and other nations will be only incidentally noticed, when there is a natural connection with the principal object." *

These objects are, as far as a tolerably close examination has enabled the present author to judge, steadily kept in view by the writer—who has disposed of his vast and intractable subject in a very masterly manner. The student is carried leisurely over the whole field of history; familiarised with all its divisions, outlines, and boundaries, and thus enabled to trace the connection of the remotest historic events with one another. † Let him, then, reso-

* Vol. I. pp. 10-11, 16-17.

† One of the most practicably valuable and convenient historical compilations extant, not only for the use of students, but for constant reference by all persons, is Mr. Keightley's "Outlines of History"—a small pocket volume of 460 pages. It divides History into three parts, viz. Ancient History, the Middle Ages, Modern History,—the last reaching down to the close of the war in 1815. From his own observation, and on the authority of several able friends, the author is able to bear testimony to the interesting and valuable character of this work.

lutely devote the leisure hours of his first year or two to an attentive perusal of this work. Can there be a more advantageous mode of carrying into effect the judicious suggestions of Lord Mansfield?—"The best and most profitable manner," he observes, "of studying modern history, appears to me to be this: first, to take a succinct view of the whole, and get a general idea of the several states of Europe, with their rise, progress, principal revolutions, connections, and interests; and when you have once got this general knowledge, *then to descend to particulars*, and study the periods which most deserve closer examination. The best way of getting this general knowledge is by reading the history of one or two of the principal states of Europe, and taking that of the smaller states occasionally as you go along, so far as it happens to be connected with the history of those leading powers which you will naturally make your principal objects, and consider the others only as accessories." *—Dr. Arnold has justly observed that

* Anything coming from so great an authority as Lord Mansfield is attended with interest, and entitled to the most respectful consideration—especially of law students. A condensed view of his lordship's "Short Plan for reading Ancient History" (first published in the *European Magazine* for 1791-2) is, therefore, presented to the reader without note or comment:

"In the wide field of ancient history," says his lordship, "I have skipped over the rugged places, because I mean to lead you on carpet ground; I have passed over the unprofitable, because I would not give you the trouble of one step which does not lead directly to useful knowledge." His plan may be stated shortly thus:—commence with Fleury, *Du Choix de la Conduite des Etudes* (§ 26, *Histoire*; § 31 *Rhétorique*);—Cicero de *Oratore*, (lib. ii. §§ 51—63); De *Legibus* (lib. i. §§ 1, 2); De *Officiis* (lib. i. c. xxii—xxiii); Dr. Priestley's *Chart*, and Playfair's *Chronological Tables*, for the duration and extent of the Assyrian, Persian, Grecian, and Roman empires, and the Goths and Vandals; various portions of Raleigh's *History of the World*; Xenophon; Thucydides; Tourreil's *Hist. Pref. to Demosthenes* (bk. i. c. 1. §§ 2—8). "Over and over, the speeches of Demosthenes," in the original, or a translation; Vertot's *Roman Revolution* (bk. xi. xii. xiii. xiv. throughout); Sallust; Montesquieu *De la Grand. et de la Decad. des*

History knows not the distinction between 'ancient' and 'modern,' with respect to *utility*. "Man," remarks an experienced writer (Mr. Keightley) "has always been the same; and no portion of his story can be quite devoid of use and interest. That of ancient Greece and Rome is now far more useful than the greater part of modern history—for they were free, and their history is that of the *people*, not of its rulers. The most important and instructive history to *us*, is that of England: next, that of Greece and Rome: and then, I would say, not that of the great kingdoms and empires, but of the Italian Republics of the middle ages. Why is Oriental history in general so barren of instruction? Simply because it is the history of Khalifs, Shahs, and Sultans, *not of the people*."

For GRECIAN HISTORY the student is recommended to that of Mr. Keightley, published originally in 1835; since which period it has attained a third edition, and deservedly enjoys the favour of the public. This gentleman is a very accurate and learned historical compiler. Patient and perspicuous in details, he can yet take a comprehensive and independent view of his subject, and treat it with judgment. He has the advantage, moreover, of being per-

Romains (cc. ii. & xi.) ; Cicero's fourteen speeches against Mark Antony ['the second, which cost him his life, is the only speech of length']. "When you have finished the above course, in the manner proposed, go over the whole a second time; which, if you make yourself master of it the first time, need not cost you many days. The next thing in order is, that you should have some notion of the history of the Roman Empire, from Julius Cæsar to the end of the fifth century. Read ch. xii. to xviii. of *De la Grandeur des Rom. et de leur Decadence*—'adding the chronology, and throwing on paper enlargements in particular parts, especially the grand epochas;' Bishop Meavie's *Disc. on Univ. Hist. Lit. de l'Empire Romain*, 'to the end.' "This," he concludes, "will give you a small map, sufficient at present. Reflect on the Roman Imperial Government; military and tyrannical, like the Turkish and Russian."

fectly familiar with all the latest discoveries and researches of historical critics, both at home and abroad. The work in question, he tells us (and as far as our own observation and inquiry have gone, correctly), "has been written directly from the best original authorities; and the works of the ablest modern critics in Grecian History and Antiquities, have been diligently studied and used—particularly Müller, Heeren, Böckh, and Wachsmuth,* among the Germans, and Arnold and Clinton among ourselves." As a specimen of Mr. Keightley's style, we shall quote the temperate and impressive paragraph with which his work concludes:—"Thus have we ventured, in narrow limits, "to trace the history of Greece, from the time of its "emergence from the mists of mythology to that of its "absorption in the wide ocean of Roman story. Greece "had performed the part assigned her by the Ruler of "the universe: she has checked the westward progress "of Asiatic dominion, she has developed nearly every "form of political existence; she has given the world "perfect models in every species of literature and art; "she has displayed the evils of civil discord, and absence "of political unity. Two thousand years have flown since "the scene closed on independent Greece; during which "period, crouching beneath the despotism of the Roman, "the Byzantine, and the Turkish empire, she has been "as nought among the nations. At length, in our own "days, we have beheld her re-appearance on the political stage, and the question naturally arises, what

* "Next to Müller," says Bishop Thirlwall (*Hist. of Greece*, vol. i. p. 443.), "Wachsmuth's and Hermann's respective '*Greek Antiquities*,' are the most important." Dr. Arnold has also borne a strong testimony to the value of Wachsmuth's labours. Both these works are translated into English, and published by Mr. Talboys, of Oxford.

“ will be her future destiny? Is she to enjoy the blessings of concord and union among the various portions of her population? Is she to emulate ancient Hellas in arts, in arms, and in literature? Is she to escape the influence of the chill withering air of northern despotism? These are questions we venture not to answer; we hope the best, but our hopes are not sanguine, for instances of national rejuvenescence are rare in the annals of the world.”

This work is in one duodecimo volume, of 484 pages, and costs only a very few shillings. Another, a larger and more elaborate work on Grecian History, has also been published in successive volumes, during the course of the last nine years; viz., the History of Greece, in eight volumes (the last of which has been only within the last few months completed) by Dr. Connop Thirlwall, the Bishop of St. David's—a profound scholar, and an original and independent thinker. The style of his history is dry, terse, and exact—not fitted, perhaps, for the historical tyro, but most acceptable to the advanced student, who is in quest of *things*, and qualified by his own acquirements to understand and appreciate the nature of this important contribution to the highest class of our historical literature. This elaborate and invaluable work, comprising everything important and authentic among the researches of the best modern scholars, will be rendered more accessible to the student, after carefully perusing that of Mr. Keightley. ROMAN HISTORY, and the study of it, may be said to have been greatly disturbed, if not indeed quite revolutionised, by the bold and profound researches and speculations of the German historian, Niebuhr; who, in the opinion of many of the most eminent scholars, has demonstrated the

greater part of that which had, till his time, been regarded as the early *history* of Rome, to be utterly fabulous—its two *kings* to be mere creatures of the imagination. He died before completing his great undertaking; but the earlier portions of it were published during his lifetime, and have been translated into English by Dr. Thirlwall (the Bishop of St. David's) and Archdeacon Hare.*

It is believed, that for the purposes of the student, the "Epitome" of the three volumes of Niebuhr's History of Rome, by Dr. Travers Twiss, of Oxford (in two volumes), will be found best adapted to afford such a full and accurate account of Niebuhr's views, as will "enable the student to determine for himself the degree of weight in their favour." Lord Brougham, also, in his Political Philosophy, (Part II. chap. x.) has made the discoveries and opinions of Niebuhr the subject of a brief and popular exposition, and independent criticism, which will be perused by the reader with all that interest which is attached to whatever falls from the pen of its highly gifted and versatile author. In *Michelet's* History of Rome (not yet completed, nor translated into English), also, will be found the modern learning on this subject: deep research being there combined with all that vivacity and brilliance for which this author is so justly celebrated. Mr. Keightley's valuable assistance is here again afforded to the student. His "History of Rome" (in one duodecimo volume of nearly 500 pages) is based upon the results of Niebuhr's researches; and distinctly apprises the reader, throughout,

* There is just announced (October, 1844) the publication of Niebuhr's "Lectures on the History of Rome, from the First Punic War to the death of Constantine, including an Introductory Course on the Sources and Study of Roman History," edited by Leonhard Schmitz, 'forming the fourth and fifth volumes of the entire History.'

of the extent to which the new views are adopted—and of their conflict with the old-established materials of early Roman history. If the student desire to extend his knowledge of Roman history, he is recommended to procure the History of Rome, by that gifted scholar (Dr. Arnold) already named, who did not live to complete more than the first three volumes * (in octavo), which are, however, executed with such ability, as to occasion deep regret, that, as in the case of Niebuhr, Providence, in its inscrutable wisdom, saw fit to interrupt such useful labours. Dr. Arnold heartily avails himself of the “materials and the conclusions” (vol. i. p. ix.) of Niebuhr, of whom he appears to be a most reverential disciple; and effectually to distinguish them from the real *history* of Rome, he has adopted a *legendary* style of writing in the introductory chapters, which dispose of the first three centuries of Rome. He thus expresses himself concerning the necessity and advantages of the study of Roman history:—

“The growth of the Roman Commonwealth, the true character of its parties, the causes and tendencies of its revolutions, and the spirit of its people and its laws, ought to be understood by none so well as by those who have grown up under the laws, who have been engaged in the parties, who are themselves citizens of our kingly commonwealth of England.”

Mr. Keightley's History of Rome extends to the downfall of the Republic, and the sole dominion of Cæsar (Augustus). A second volume was published in 1840, entitled the “History of the Roman *Empire*, from the Accession of Augustus to the end of the Empire in the

* Archdeacon Hare, the learned co-translator of Niebuhr, with Bishop Thirlwall, has undertaken to complete Dr. Arnold's History of Rome.

West," in the fifth century (A.D. 476). Over this vast tract of important and varied history, Mr. Keightley will be found a faithful and able guide; and we can commit the student to his care without any hesitation. He closes his history with the following just and instructive observations:—

"The fall of the Roman Empire was in the order
"of nature, which has set limits to all things human;
"but it is not unworthy of remark, that at the time
"when the Roman Republic was at the very height of
"its power, the Tuscan augurs ventured to foretell the
"period of Roman dominion. According to the rules
"of their art, they inferred, that the twelve vultures seen
"by Romulus, denoted the twelve centuries of rule
"assigned to his city by the decrees of Heaven. The
"accomplishment of that prophecy is a curious fact; but
"history contains many such coincidences. The *rise* of
"Rome is one of the most extraordinary phenomena in
"the annals of the world; its *fall* was an ordinary event,
"and contains nothing to excite surprise. The Roman
"Empire, as left by Augustus, embraced the whole civi-
"lisation of the West, while on all its confines dwelt poor
"but brave and energetic nations, eager, when an occa-
"sion should offer, to rush in and seize its wealth. It
"was only, therefore, by the conservation of the military
"spirit, by which it had been acquired, that it could be
"retained; but we have seen how early and how totally
"this spirit became extinct. When the nobles and men
"of property were immersed in luxury and sensual indul-
"gence, when the country was depopulated or filled only
"with slaves, the cities thronged with an idle, beggarly,
"turbulent population, vigorous only for evil; when the
"provincials were so beaten to the earth by excessive taxa-

“tion, that the rule of barbarian conquerors was looking
“to an alleviation; when the noble, elevating, soul-ex-
“panding religion of the Gospel had been degraded by
“Oriental asceticism, into a slavish, enervating, supersti-
“tion; when, finally, the defence of the empire against the
“Barbarians, was entrusted to the barbarians themselves,
“its fall was assured. A new order of things was to arise
“out of the union of German energy with Roman civili-
“sation, from which, after a series of many centuries,
“were to result the social institutions of modern Europe,
“the colonisation of the most distant regions of the earth,
“and the mighty political events which yet lie hidden in
“the womb of time.”

At this point—the dividing-line between ancient and modern history—we resign the student to a very accomplished and experienced guide, Professor Smyth; in whose “Lectures on Modern History, from the irruption of the Northern Nations, to the close of the American Revolution,” (in two volumes, 8vo.) will be found minute directions for an extended course of reading in modern history, and a great fund of enlightened reflection, and profitable suggestion. It would be presumptuous in us to attempt to usurp any of the functions of such an instructor as this; but two or three works lie in our way which cannot be disregarded. The name of GIBBON will occur to the student as a splendid, but in some respects, dangerous guide, down to the close of the sixteenth century. We say he is a dangerous guide, in respect of his gross and malignant misrepresentations concerning the Christian religion; and we recommend the student to procure the Reverend H. Milman’s edition of Gibbon, in which that great writer’s errors and misrepresentations

will be found exposed with candour, freedom, and learning.

Mr. Hallam's "View of the State of Europe during the Middle Ages," (now published in two volumes 8vo.) is *indispensable* to the historical student; and Dr. Robertson's delightful History of Charles V., (which sets out at the year 1500,) is probably already pretty familiarly known to him. He must take care thoroughly to master the "Preliminary View of the Progress of Society in Europe, from the subversion of the Roman Empire, to the beginning of the sixteenth century," [i. e. the period at which Gibbon *really* closes his labours,] a very choice and beautiful performance.* With Charles the Fifth, as the student will have gathered from Lord Woodhouselee, commenced a new era in political history: when all the European states were, in a manner, *conglomerated*; so that each 'holding a determinate station, the operations of one are so felt by all, as to influence their councils, and regulate their measures.'† The student will read over very frequently the concluding chapter, which is a luminous summary of the leading events narrated in the preceding pages of that admirable work; and thus will he be brought, by a skilful guide, to the middle of the sixteenth century [1558]. But for the recently published

* Dr. Gilbert Stuart, however, it should be mentioned, published an essay, commenting very severely on Dr. Robertson's—pointing out what are alleged to be serious mistakes and misrepresentations.

† "It was during his reign," too, says Robertson—"that the different kingdoms of Europe, which in former times seemed frequently to act as if they had been single and disjointed, became so thoroughly acquainted and so intimately connected with each other, as to form one great political system, in which each took a station wherein it has remained since that time, with less variation than could have been expected, after the events of two active centuries."—*Charles V. Works*, vol. vii. pp. 222, 223.

Lectures of Professor Smyth, we should have been at a loss how to point out adequate conductors through the vast complicated mazes of European history subsequent to this period.

"The quantity of important matter," observes the author already referred to (Lord Woodhouselee), "which accumulates as we reach the more recent periods—the interest which attaches itself to innumerable events, less from their actual importance, than from their connection with the feelings and passions of the present day, conspire to render the materials of recent history of a magnitude so disproportioned to those which form the narrative of more distant periods, that no discrimination could suffice to condense them within the requisite compass. It is the lapse of time alone which settles the relative importance of such materials; that throws into the shade, or blots out from the canvas, those details, which, however interesting they may seem to the actors, are of no real value *to posterity*; and leaves the great picture of human affairs exhibiting such features only, as deserve a lasting memorial, and preserve their importance long after their immediate interest shall have ceased to enhance it."*—The interval between 1558 and 1844 remains a fine field for the exercise of historic genius. Innumerable "Histories," "Memoirs," "Sketches," &c., have, from time to time, been given of particular periods and kingdoms; but there is yet wanting a uniform and combined *History of Europe* during the interval—*hiatus valde deflendus*—alluded to. During this interval the student will consult Professor Smyth, who

* Univ. Hist. vol. vi., pp. 303, 4.—This just and beautiful observation appears to have been suggested by the opening paragraph of Hume's chapter on the reign of Henry III.

will faithfully point out to him the best sources of information, and very eloquently direct him how effectually to avail himself of them. THE HISTORY OF CIVILISATION IN EUROPE, from the Fall of the Roman Empire till the French Revolution (of which there are several translations into English to be bought for a mere trifle), by *M. Guizot*, the present gifted Prime Minister of France, is well worthy of an attentive perusal. He reduces the elements of that civilisation to four—the *Church*, the *Feudal System*, the *Boroughs*, and the *Royal Power*: four grand topics which he discusses in a very philosophical and enlightened spirit. His account of the Crusades, the Reformation, and our own Revolution, will also be found to present many interesting and striking views to the English reader. Lord Brougham has recently expressed his opinion that this work is “one of great value, and deserves deeply to be studied;”* and other high authorities have emphatically expressed the same opinion.—It is impossible to quit this branch of the subject without calling attention to one of the most important and valuable contributions to historical literature which has been seen in modern times—Mr. Alison’s “History of Europe, from the commencement of the French Revolution, in 1789, to the Restoration of the Bourbons in 1815.” This work is in style occasionally, perhaps, a little too diffuse and ornate—but it constitutes a vast storehouse of historical and political knowledge, not only concerning the naval and military, but *financial*, *domestic*, and *constitutional* history of Europe, especially of Great Britain, during the eventful quarter of a century which it traverses. In this work the highest attainable degree of authenticity, as to facts, and of candour, and

* Political Philosophy, vol. i. p. 274, *note*.

moderation in reasoning, is combined with such a sustained and vivid descriptive power as has been rarely surpassed, and never before, that we are aware of, brought to bear so effectively and advantageously upon grave history. We are proud in being able to claim this distinguished writer as one of our professional brethren (of the Scottish Bar). This work is in ten octavo volumes, and probably too expensive to admit of its being purchased by the bulk of students—who, however, can never be at a loss for opportunities of meeting with it in public libraries and institutions; very few, if any of them, being without it.

By the time, however, that the student shall have advanced thus far, he will be capable of selecting for himself proper works for perusal, as time and inclination may prompt him to prosecute historical studies. We would recommend him, however, not to lose sight of the work with which he set out—Lord Woodhouselee's *Universal History*; but let him, while expanding the course of reading there indicated, preserve, by repeated reference and perusal, a due connection and dependence between the parts, and the whole, of *universal* history.

Surely, on the one hand, there is nothing formidable in the course here suggested; while, on the other, the student must bear in mind that the foregoing constitutes but a slight and popular course* of historical

* It is possible that some, intending to become legal students, may consider even the course of historical reading suggested in the text too extensive and troublesome for their means and opportunities. If so, perhaps they cannot do better than procure two moderate-sized duodecimo volumes, by Dr. W. C. Taylor, an able and accomplished writer;—and which contain respectively summaries of *Ancient* and *Modern* History, down to the conclusion of the recent war with China. They are well adapted for the use of such students; and as far as the author's examination of them has gone, they appear to be very satisfactorily executed, in respect both of style and matter.

reading, such as may possibly give him a taste for, but can never supply the place of, that extensive and philosophical knowledge of history which ought to be possessed by a highly educated gentleman—by him who aspires to become a leading character in his day and generation,—either as a scholar, a public writer, a lawyer, or a statesman. To return, however, to the student for whom these pages are designed—he will do nothing without that fixedness of purpose before spoken of, which will enable him to go steadily through with the course of historical study which he may adopt. If he be perpetually changing,—dipping first into this, then into that, and then the other book; sometimes long intermitting his historical readings, or hurrying without the least *reflection* over the pages, as if against time, merely to *make believe* to others, or to himself, that he is studying history, he will but have wasted his precious time; he will have made no substantial acquisitions of a knowledge which is pre-eminently important to an aspiring lawyer, but got a wretched, confused smattering of history, which will lead him into endless error and mortification.—It will be observed that little or no mention has yet been made of *English* history, except so far as it forms a part of the general course of historical studies: it is a subject of such importance, as to warrant a separate chapter.

Having obtained a competent degree of knowledge of the *Facts* of History, the student's next object should be, to deduce from them those great lessons of practical wisdom, for which alone authentic history, however entertaining, is really valuable. Hence the study of **POLITICAL PHILOSOPHY**. Within the last few months this department of knowledge has received an acqui-

tion, undoubtedly of great importance, in the completion, after five years expended upon the task, by Lord Brougham, of his "Treatise on Political Philosophy," in three moderate-sized octavo volumes. His lordship's political opinions are well known; and whoever examines this, his last and greatest work, must expect to see him maintain those opinions, as he does maintain them, with boldness and decision. The candour and calmness, however, with which he discusses his subject, are conspicuous: and he brings to an undertaking of such magnitude and responsibility, so vast a fund of knowledge, such experience in public affairs, and such practised intellectual power, as combine to warrant the expectation that he has not staked his great reputation, both at home and abroad, upon a work of such pretensions, lightly undertaken, or unfairly or imperfectly executed. His lordship, at the close of his work, thus expresses his sense of this responsibility:—"It is impossible for me to look back at the vast field over which I have presumed to travel,—both of general principles, comparative views, and of historical and statistical facts, without feeling appalled by the boldness of an undertaking so far beyond the reach of any powers, whether of reasoning or of learning, which I could bring to bear upon it. * * They who have most profoundly studied the principles of government, they who have most learnedly examined its records in the history of human policy, and they whose knowledge of existing institutions in foreign countries is most extensive, will be the most candid judges of my labours, because they are the best able to understand the great difficulties of such an enterprise." The work consists of a TREATISE, in three parts: consisting of—(I.) The Prin-

ciples of Government—Monarchical Government. (II.) Of Aristocracy—Aristocratic Governments. (III.) Of Democracy—Mixed Monarchy: “these three constituting the first great branch of Political Philosophy,—that is, the *Theory of Government*, and its application to all the constitutions which have been framed in both ancient and modern times, by human skill, for the direction of human affairs. * * It embraces the *Structure* of Government, and is complete in itself; the *functions* of government remaining to be explained, including *Political Economy*, and *Political Arithmetic*; which will furnish the whole course of political philosophy.” A work of so comprehensive a character as this, dealing with so many great moot points in political science, and passing in review all ancient and modern and existing constitutions, cannot be expected to secure the entire concurrence in opinion of any class of readers; but all will acknowledge how interesting and valuable must be the fair *discussion* only of such a subject by such a writer, not dogmatising, but assigning his *reasons*, and giving his *authorities*—and collecting a rich store of information from quarters inaccessible to many of his readers. There is scarce a topic of importance, connected with the science, which will not be found discussed by Lord Brougham, in a frank, enlightened spirit, and always freely communicating the latest and best views of the subject. In point of composition, this work is characterised by the vigour and perspicuity which distinguish the style of Lord Brougham. We are acquainted with no other work pretending to so comprehensive a character—but here it will, doubtless, be interesting to the reader to peruse Lord Brougham’s own opinion of the necessity which existed for such an undertaking. We

therefore give it in the note beneath ; * adding merely that we have at various times consulted important sections

* "The political works already before the world, in England, are liable to two great objections : none of them professes to instruct upon more than some detached portions of the subject ; and all of them, even upon these particular departments, are defective in presenting a view of the science in its improved state : while, on some of the most important branches of the whole, there are no treatises whatever extant. Thus it would be difficult to inform the student of political philosophy what books he should consult, in order to obtain a view of the constitution of the different governments established in various parts of the world. The work of *Dr. Paley* embraces the principles of political as well as moral philosophy ; but able and judicious as, in many respects, that portion of the book is, the space allotted to it being little more than one-third of two moderate-sized and widely-printed octavo volumes, shows how far it must be from explaining the whole of even the principles of the science. Of political economy it has almost nothing ; it gives only the principles of government in their most general form ; it makes no application of them to any other constitution than that of England ; it derives from the constitution of no other country any illustration of them ; and it may justly be regarded rather as an illustration of the doctrines of moral philosophy, and an appendix to the main body of the work, than as a treatise on political science. The work of *Lacroix*, on the European constitutions and that of the United States, it is believed, has never been translated ; but however this may be, nothing can be more superficial ; and as it was published by a political partisan during the stormy period of the French Revolution, it is throughout more or less tinged with party opinions and the feelings of the day ; not to mention that the half century which has elapsed since its publication has made no little change in many of the old constitutions, and called not a few new ones into existence. It may, indeed, be further affirmed, that nearly the same difficulty exists of referring the student even to any treatise of political economy, which at once professes to handle the whole subject, and is suited to the present improved state of science. The celebrated work of *Adam Smith* does not at large and systematically treat the subject ; it is rather an exposition of the errors of the mercantile system, than a full exposition of the whole science ; and, besides that many of the doctrines are now generally admitted to be erroneous, many important discoveries of late times, as the doctrines relating to rent, to currency, to population, are left wholly untouched. The works of *Mr. Ricardo*, *Mr. Malthus*, and *Mr. Mill*, though entitled on Political Economy at large, are confined to the discussion of certain principles, highly important, indeed, but both controversially handled by those emi-

of the work, with great satisfaction: and feel that no apology can be due for calling the attention of the student to so important a work, by so eminent a man as Lord Brougham.* He thus sums up the results of his labours:—

“nient writers, and embracing only a small portion of the whole science; “while the only English book professing to go over the whole subject, that “of Sir James Steuart, being written before the speculations of Smith in “this country, and the Economists in France, contains, on most of the subjects described, as different a view of the science from that now universally “received, as if it were written upon another branch of learning.”

“The works of French authors are equally liable to objection if regarded “as treatises at once exhausting the subject and adapted to the existing state “of our knowledge upon it. Montesquieu’s *Spirit of Laws* deservedly enjoys “a high reputation for bringing together many principles relating to the philosophy of government: but besides that it is almost wholly confined to that “branch of the subject, it is built entirely upon a fanciful system, recommended by an appearance of symmetry and generalization, and wholly “devoid of solidity; while it throughout bends the facts of the case to suit a “theory, and substitutes for the exposition of sound principles, the perpetual “use of antithesis and epigram. The writings of the Economists are confined wholly to one portion of the theory; and that is given in the peculiar “sense of their own school, besides being presented in a form extremely “repulsive, both from the abstruseness of the argument, and the dry and “unskillful nature of its composition. The treatise of *Say* is confined to “economical science, and contains none of the latest improvements. The “different heads of the *Encyclopédie par Ordre des Matières* contains, perhaps, both the best discussion of principles and the fullest account of facts “anywhere to be found; but these dissertations and narratives are scattered “over many volumes, and do not in any degree supply the want complained “of, beside being deficient in recent matter both of fact and of principle. “The objections to Lacroix’s work have already been stated; and it is “confined to one branch of political science.”

“It seems evident, then, that some full, yet popular, explanation of the whole principles of political philosophy is wanted.” Vol. i. pp. 31, 32. (*Introd.*)

* De Tocqueville’s *DEMOCRACY IN AMERICA* (four vols. 8vo) will probably occur to the student as a work also worthy, at his leisure, of perusal. It contains many ingenious and some profound reflections upon the present stage of that “EXPERIMENT” of which Dr. Paley spoke in 1785, “as about to be tried in America on a large scale.” (Mor. and Pol. Ph. Book vi.

“ We have now had an opportunity to consider minutely
 “ all the great principles which have guided men’s conduct
 “ in the systems of polity founded by them at any period
 “ in the history of the world. We have discussed the
 “ foundations of Government generally, of its different
 “ species severally, under the six several heads of Mo-
 “ narchy,—Absolute (or Oriental); Constitutional (or
 “ European); Aristocracy, Democracy, and Mixed Govern-
 “ ment—whether Monarchical or Aristocratic. We have
 “ weighed the merits and the faults of all these schemes of
 “ polity in much detail, and have examined minutely the
 “ practical working of each. We have then investigated
 “ the application of the general principles to the various
 “ forms of government, which have at different times and
 “ in various countries, been known among nations. We
 “ have traced the history of them all—examined the
 “ advantages secured, and the disadvantages experienced
 “ under them all severally—contemplated their practical
 “ working—compared them one with another, to show
 “ both their resemblances and their diversities—and have
 “ *constantly referred their detailed arrangements to the*
 “ *general principles of government previously expounded.*
 “ Our examination has in this way comprehended between
 “ forty and fifty forms of government, in ancient and
 “ modern times. Upon the important subject of the
 “ British Constitution, we have naturally dwelt much more
 “ minutely than upon any other: next to our own, upon
 “ the Constitution and the Constitutional History of our
 “ friends and neighbours, the French.”*

c. 6.) The same topic is abundantly discussed in Lord Brougham’s Political Philosophy, in which, however, we do not recollect having seen any allusion to the work of De Tocqueville.

• Vol. iii. p. 404.

METAPHYSICS—MORAL, OR MENTAL PHILOSOPHY. What shall be said upon this subject, to a student? What do we now really *know* of that strange mysterious thing, the HUMAN MIND, after thousands of years' ingenious and profound speculations of philosophers? Has the Almighty willed that it should be so?—That the nature and operations of the mind shall for ever be shrouded in mystery impenetrable, and that we shall continue at once pleasing, puzzling, and harassing ourselves, and exercising our highest faculties to the end of time with contradictory speculations and hypotheses?—However this may be, if the author were desired by the student to point out for occasional leisurely perusal some one comprehensive work upon these interesting, bewildering, and perplexing subjects, he would venture to name the late Dr. Brown's "*Lectures on the Philosophy of the Human Mind*;" a work which has for years been perused by the writer of these pages with constantly increasing admiration of that eminent author's subtlety of intellect and power of analysis.—"It was in metaphysics," observes his very zealous and affectionate biographer, "that he turned this power to most account. States of mind which had been looked upon for ages as reduced to the last degree of simplicity, and as belonging to those facts in our constitution which the most sceptical could not doubt, nor the most subtle explain, he brought to the crucible, and evolved from them simpler elements. The knot which thousands had left in despair as too complicated for mental hand to undo, and which others, more presumptuous, had cut in twain, in the rage of baffled ingenuity, he unloosed with unrivalled dexterity." With occasional instances of looseness, redundancy, and excessive poetical quotation, (which

may be explained by reference to the form of their composition, viz. lectures for a University class); the easy and graceful play of an accomplished master-mind is perceptible throughout: the reader finds himself gradually and pleasantly conducted down into the profoundest depths of metaphysics, which are then irradiated with the lustre of innumerable vivid illustrations. Here will be found not only the speculations and theories of metaphysicians in ancient and modern times, either refuted, or confirmed and illustrated, in a masterly manner; but profound and *original* views of the constitution and operations of the human mind. The work consists of one volume, octavo, (in double columns,) comprising one hundred short "lectures"—excellently calculated for separate and successive perusal; and it may be procured for a very moderate sum.* The student is also referred to the four admirable Dissertations on the Progress of Metaphysical and Ethical Philosophy, and Mathematical and Physical Science, by Dugald Stewart, Sir James Mackintosh,† and Professors Playfair and Leslie, contained in the first volume of the last edition (the 7th) of the *Encyclopædia Britannica*—a work which is an honour to the country. It may at present be procured for a moderate sum, and will be found of inestimable value to the higher classes of lawyers, who have such sudden and constant occasion for access to a vast range of human knowledge.

* The "Elements of the Philosophy of the Human Mind," to which the author of the present work is indebted for several valuable suggestions, by Dugald Stewart, are so universally known and admired, as to render superfluous any mention of them here.

† This eminent metaphysician's opinion of the system of Dr. Brown, as developed in the Lectures already spoken of, will be found given elaborately in the *Second* of these "Preliminary Dissertations," (Sect. vi.) *Encyclop. Britann.* vol. i. p. 394, (7th ed.)

POLITICAL ECONOMY—"Of statesmen and legislators," says Professor Smyth, "History and Political Economy are the professional studies, and are never to cease." A careful study of ADAM SMITH'S "WEALTH OF NATIONS," will put the political law-student in possession of the leading principles of this science, as enunciated by its great founder.—"His was, perhaps, the only book," says Sir James Mackintosh, "which produced an immediate, general, and irrevocable change in some of the "most important parts of the legislation of all civilised "states."* This is a work which will also be found to throw light upon many important portions of English history, and constitutional law. Some, however, of the successors of Adam Smith have called in question the soundness of several of his views ;—and to become acquainted with the nature of such objections, and of the opinions entertained by the leading economists of the present day, the student would do well to purchase *Mr. M'Culloch's Edition* of the "Wealth of Nations," which may be obtained for a very moderate sum. The "Supplemental Notes and Dissertations" which are appended to the work, contain a systematic and comprehensive account of the main doctrines of the present race of political economists. If carefully and cautiously read, they will be of great service to the student. In addition to the "Supplement"—brief notes are appended to the body of the work, pointing out those portions which the editor considers to be, when tested by the results of experience, since the days of Smith, at least questionable, or to require explanation. This gentleman has also published an independent Treatise on Political Economy, and is now engaged upon a very interesting work (nearly ready for publication)

* Prel. Diss. Encyc. Brit. vol. i. p. 358.

entitled "The Literature of Political Economy," consisting of a full critical account of all the works which have from time to time contributed towards the formation of that science. Though the subject, however, of continual examination and discussion, it is at present in a very unsatisfactory state—and appears to have made far less progress than might have been expected since the days of Adam Smith. To this hour, its leading professors are wrangling about matters on which they ought to have been long ago agreed—as upon the very elements of their science. In the Appendix to the "Logic" of Dr. Whateley (Archbishop of Dublin), it will be found demonstrated, that scarce any two writers on Political Economy affix the same meaning to the following "seven principal terms:"—viz., VALUE, WEALTH, LABOUR, CAPITAL, RENT, WAGES, PROFITS!—Is it presumptuous to prophesy that this will be the state of matters for a long time yet to come? And that the less the young law student—unless he have an irresistible tendency towards such studies—come within the "din of all this smithery," the better?

The political writings of the illustrious EDMUND BURKE need be mentioned, only, to vindicate their claim to the continual perusal—the earnest study, of all who are capable of appreciating the display of profound wisdom, set forth in enchanting eloquence, made contributory to the advancement of the permanent and highest interests of mankind, and capable of indefinitely elevating and expanding the feelings and understanding—but vain is the task of attempting to do justice to writings upon which panegyric has long ago exhausted itself. Out of a thousand witnesses, let us select the testimony of one only—one, however, who has a paramount title to the attention and

deference of that Bar, of which he was one of the brightest ornaments—Lord Erskine. “Among the characteristics of Lord Erskine’s eloquence,” observes the late accomplished Mr. Henry Roscoe, “the perpetual illustrations derived from the writings of Burke, is very remarkable. In every one of the great state trials in which he was concerned, he referred to the works of that extraordinary person, as to a text-book of political wisdom,—expounding, enforcing, and justifying, all the great and noble principles of freedom and justice.”* Lord Erskine himself has left on record his impressive testimony to the same effect: “When I look into my own mind, and find its best lights and principles fed from that immense magazine of moral and political wisdom, which he has left as an inheritance to mankind for their instruction, I feel myself repelled by an awful and grateful sensibility from petulantly approaching him.”

Logic. It will be obvious to the very youngest and least educated person who contemplates coming to the Bar, that if he finally make choice of it, all the rest of his life will be occupied in REASONING:—reasoning, too, not alone—in his study, or chamber only,—but in public, *visd voce*—in the presence of an auditory perfectly competent to appreciate excellency or deficiency;—reasoning, moreover, of the closest kind, and on difficult subjects, and often against an acute and dextrous opponent—a young counsel often finding himself, to his great alarm, unexpectedly opposed to one of the best and most celebrated reasoners of the Bar. A case which his inexperienced client may have deemed of very little importance, and consequently entrusted it to a young and compara-

* Lives of English Lawyers, p. 384.

tively inexperienced counsel, may be deemed by his more shrewd opponent of such importance as to warrant him in securing the services of one of the most eminent counsel at the Bar: and this circumstance is often not known till the very instant has arrived for action! Finally, this reasoning takes place before judges who have reached their eminent position by reason of their whole lives having been occupied, with superior success, in the process of "reasoning;"—and also, are continually interposing to point out inconclusiveness and fallacy in the person arguing before them. Is it not plain from all this, that to acquit himself with bare decency—to escape most mortifying and perilous exposure, the young lawyer must early qualify himself for these intellectual struggles? And does he suppose that his own unassisted, untrained faculties will suffice, as the occasion arises, to fit him for this "occasion sudden"—this "practice dangerous?" He will soon find the contrary to be the case, to his cost: but these subjects form, more appropriately, the subject of the ensuing chapter. It is here introduced for a subordinate, but, by no means, unimportant purpose: viz. to enable us to apprise the student that he must *very early familiarise himself with the correct meaning of at least the leading technical terms of Logic*—which are of frequent use in the courts—not for petty pedantry or display, but from their real advantage—from, indeed, the necessity of the case. Instances of the vexatious consequences of ignorance in these matters will not unfrequently fall under the notice of a watchful observer. Some two or three years ago a counsel, manifestly not having enjoyed a *very* superior education, was engaged in arguing a case, in

banco, at Westminster—before four very able judges, one of them being a man remarkable for his logical acuteness and dexterity. “No, no—*that* won’t do,” said he, suddenly interposing—“put the converse of the proposition, Mr. ———: try it *that* way.” The judge paused: the counsel too paused, while a slight expression of uneasiness flitted over his features. He expected the *judge* to “put the converse” for him: but the judge did not. “*Put the converse* of the proposition, Mr. ———, and see if *that* will hold”—repeated the judge, with some surprise, and a little peremptoriness in his tone. But it was unpleasantly obvious that Mr. ——— *could* not “put the converse” of the proposition—nor understand what was meant. Some better-informed brother barrister whispered to him the converse of the proposition—but it was useless:—Mr. ——— faltered—repeated a word or two, as if mechanically—“*Well!*” said the judge, kindly suspecting the true state of the case, “Go on with your argument, Mr. ———!” It may appear strange that so glaring a case should occur at the Bar—but, nevertheless, such a case *did* occur, and such cases have occurred, and are likely to occur again, as long as persons of inferior education come, intrepid in ignorance, to the Bar. To one who modestly perceives, on reading the above, its applicability to himself, the author recommends a little publication specially adapted for the purpose, and of which a second and revised edition has just been published, under the title, “*Easy Lessons on Reasoning.*”* It is a small pocket volume, of 160 pages, costing eighteenpence only; and the production of one consummately qualified for the task—in short, the present Archbishop of Dublin. This is a complete little treatise, in familiar terms, and an

* Published by J. W. Parker, West Strand.

elementary style, on Logic; and calculated to be of service to men several degrees higher in pretensions than unhappy Mr. ———. Nay—a very eloquent and eminent counsel some time ago gave his hearers the following evidence of his having long ago forgotten his early logical studies. “Gentlemen,” said he, vehemently addressing a jury, at Westminster—“my learned friend undertook to produce a *man* who was present: did he? No! on the *contrary*, he produced a *woman*!” The jury laughed heartily; so did the judge and the Bar; but for different reasons!—In conclusion: any one paying a little attention to what goes on at the Bar, will soon see the fatal advantages possessed by an expert logician over one who is ignorant of, or only superficially acquainted with, the mode of detecting subtle and plausible fallacies.

SECTION II. MEDICAL JURISPRUDENCE.—TRADE AND COMMERCE.—ARTS AND SCIENCES.—NATURAL PHILOSOPHY.

So much, then, for HISTORY—with its satellites, GEOGRAPHY and CHRONOLOGY—POLITICAL PHILOSOPHY—and MORAL (or MENTAL) PHILOSOPHY. In respect of all of these, gentlemen who have received a superior education come to the Bar pretty satisfactorily furnished—or have been at least well grounded in them. If ambitious of attaining eminence at the Bar, and in Parliament, they must not only sedulously keep up their knowledge on these subjects, but deepen, extend, and acquire a complete practical command over it. Those who have not been so fortunate as to come to the Bar thus furnished for public life,—thus prepared to avail themselves, however early or sudden may be the oppor-

tunity, of carefully digested historical and political knowledge, and yet feel an irrepressible yearning after the acquisition of it—will adopt some or all of the foregoing suggestions, or those of persons in whom as advisers they feel complete confidence. A third class,—it is hoped for the honour of the profession, a very limited one—may think fit to discard the whole as superfluous, in respect of *their* purposes in coming to the Bar—viz., simply acquiring as soon as possible a livelihood, by the practice of their profession, whether at or under the Bar. They constitute, as it were, the journeymen lawyers. To all these classes, however, we have now to offer, in concluding this long but, as *we* deem it, important chapter, advice which cannot with safety be disregarded, and to which, therefore, we most anxiously intreat the student's attention.

I. MEDICAL JURISPRUDENCE.—In the case of the great majority of persons joining the common-law bar, and attending the assizes, and in all cases of barristers attending the sessions, the young barrister is likely to have early opportunities, either as counsel for the Crown, or for the prisoner, of displaying his acquaintance with, or his ignorance of, that mixture of legal with surgical, anatomical, or medical knowledge, which constitutes what has recently grown to be regarded as a science of itself, viz., "Medical Jurisprudence"—otherwise known as "Forensic Medicine"—"Legal Medicine"—and in Germany, as "STATE MEDICINE;" which last Dr. Beck considers the preferable term.* In establishing or repelling a case of imputed

* *Medical Jurisprudence*, (seventh ed. 1842), Introd. p. xi; where the science is defined as "that which applies the principles and practice of the different branches of medicine" [including anatomy, surgery, chemistry, &c.] "to the elucidation of doubtful questions in courts of justice."

guilt, of this description, the young counsel has the chance afforded him of really and *early* distinguishing himself, by the exhibition of superior knowledge and ability—by acutely cross-examining medical men, and sifting their evidence, in cases of vital interest both to the prisoner and the public—when great and often capital crimes have been committed, by poison, by wounding, by strangulation, or otherwise;—and when the defence of Insanity is set up on behalf of the prisoner. It is manifest that on occasions of this kind, daily occurring on circuit, a fair knowledge, *deliberately acquired* beforehand, of the nature and operation of the various poisons—of the structure of the human body—of the *indicia* of different species of injuries—and the *criteria* of mental sanity, insanity, or simulated insanity—will be of immense importance to the young counsel; enabling him, even when suddenly called upon, as is often the case, to conduct cases of intense popular interest, to exhibit that calmness, self-reliance, and acuteness, which no sudden confused “*cram*” can ever confer upon him. The best work by far upon the subject of Forensic Medicine, of all those which have come under the author’s notice, is the MEDICAL JURISPRUDENCE of Dr. BECK—which is not only an instructive, but a highly interesting work. A new edition of it (in one thick 8vo. volume), has been recently published, containing all the latest information on the subject.

It is not, however, in *criminal* cases only that this species of knowledge will be so highly valuable, and even indispensable. Look at the painfully-interesting cases of alleged *lunacy* in Commissions *De Lunatico Inquirendo*, which the common law counsel is so frequently called to conduct; the execution of wills and other documents impugned on

the ground of insanity; actions brought against medical men for alleged negligence or unskilfulness; or the payment of their bills resisted on that ground—these last two being occasions on which, where so much professional reputation is at stake, desperate exertions are naturally made to defeat or establish the charge; and all the art and mystery of medical and surgical treatment is explained and canvassed in court, and the utmost energy and skill is required by the contending counsel. No intelligent student can contemplate such cases as these, which always attract a considerable degree of public notice, without perceiving the necessity of directing a reasonable share of attention to this branch of his professional education. If he can spare the time, and have convenient opportunities, he will derive great advantages from occasional attendance on medical, surgical, or anatomical lectures—either at King's College, or some other of the numerous medical schools in the metropolis*.

* In the case of *Cooper v. Wakley* (see 1 Moody & Malkin, p. 248), tried on the 12th Dec., 1828, at Westminster, before Lord Tenterden, the plaintiff, an eminent surgeon, sued the defendant for a coarse and intemperate libel, which charged the plaintiff with gross and fatal unskilfulness in performing the operation of lithotomy. The late Lord Abinger—one of the most consummate advocates whom any age or country ever produced—was counsel for the plaintiff, and took great pains beforehand to familiarise himself with the mode of performing such operations, &c. When the case came into court, the defendant, a clever surgeon, who had pleaded the *truth* of the charge, conducted his own case, and exerted himself desperately to sustain his case against the plaintiff. Though he succeeded (through a technical point raised for him by another most distinguished advocate now at the Bar, Mr. Kelly, whom the defendant had retained to assist him in points of law) in obtaining the right to begin, and of general reply—a most important advantage—he was foiled and defeated; and, after a two days' trial, a verdict for £100 damages was returned against him. Lord Abinger (then Sir James Scarlett) aware of the immense importance of the case of his client, made commensurate and splendid exertions. To have heard him, as the author did, you might have imagined that he had been a great operating surgeon all his life!

II. TRADE AND COMMERCE.—It is manifest that a profession which is appealed to every hour of the day, by persons carrying on business as tradesmen, shop-keepers, manufacturers, accountants, auctioneers, surveyors, architects, merchants, &c., to adjust the knottiest disputes which arise between one another, and between themselves and the public, requires the possession by counsel of a considerable degree of practical knowledge in such matters. Much of this will be gradually gained by experience, if the young counsel be fortunate enough to obtain it; and he will greatly increase his chances of obtaining it, by early qualifications to deal with such cases. Let him as soon as ever he has commenced attendance in the courts, attend closely to details of cases of this description. If he acquired early in life a knowledge of mercantile arithmetic, let him refresh his memory at every possible opportunity, and familiarise himself with the correct and rapid use of the tables of weights and measures, the calculation of money, especially the calculation of *interest*, *discount*, &c.; and, above all, the mysteries of *book-keeping*. It is absolutely impossible to dispense with such knowledge; and the want of it is often felt most when there might have been the best opportunity of displaying with effect the possession of such knowledge. The mercantile public, looking on in court, and the parties concerned, make no allowance for the ignorance or inexpertness displayed by counsel. “If he don’t understand *business*,” say they indignantly, “why did Mr. So-and-So give him a brief?” How many—how very many—important causes has the author seen won and lost, solely in consequence of the superior familiarity with such matters, and the confident dexterity which it has conferred, displayed by one over the other of the contending counsel?

Causes of this description constitute by far the greatest proportion of the business transacted in courts of law and equity; and in the former case, actions involving peculiar difficulty and complexity of accounts, are almost invariably "*discussed out of court*," as the phrase is; that is to say, they are referred to arbitration, to some Barrister (sometimes to some skilful accountant or merchant) who, as well as the two junior counsel, on whom the conduct of such cases then almost invariably devolves, is expected to be expert in unravelling intricate accounts, quick in calculation, and acute in detecting the artful frauds constantly practised by experienced swindlers. It is true that counsel and attorneys are often attended on such occasions by persons skilled in such matters—by able accountants; but their assistance and suggestions cannot be properly appreciated and acted upon, on the spur of the moment, by one who has beforehand little or no familiarity with such matters; and the position of counsel then becomes very galling—he is conscious of being unable to see that which his own clients and assistants—and, alas! too his *opponents*—see most distinctly. Deficiency in any of these matters is sure to be severely visited upon the unfortunate counsel; the attorney or solicitor, however friendly may be his disposition, is disappointed and mortified; and vehemently abused for having "employed a mere fine gentleman, that knew nothing of his business, and has been completely jockeyed by the other side." On the contrary, dexterity in such cases, conjoined with a sound and ready knowledge of law, *tells* directly in favour of either the counsel who is arbitrator, or those engaged before him on behalf of the parties. Look, therefore, to these things, student, whoever you may be; familiar with Plato, Aristotle, Thucydides,

Demosthenes, Pindar ; with Cicero, Tacitus, Lucretius ; with Euclid, Newton, La Place. Now it is time to pay your addresses to the Ready Reckoner, the Clerk's Assistant, and the Book-keeper's Guide ! *Verbum sapienti !* Cannot you conceive the irritation, the inexpressible mortification, with which, having neglected this advice, you find yourself, on obtaining several early chances of employment—ineestimable as opportunities of exhibiting your capacity for business—miserably defeated—plainly foiled by an opponent, who though he may know no more than a horse of Aristotle or Newton, *knows Cocker* well, and is thoroughly familiar with the details of business ? He may be as callous, vulgar, and illiterate as you are sensitive, refined, and learned ; but—bah ! he is here your *master* ; he is showing it, and he will show it the more, the more that he perceives how exquisitely it galls one everyway otherwise his superior ! We never offered any practical suggestions with a deeper conviction of their real value and importance, often not at all, or only partially, perceived—than we have felt while penning this paragraph.

It would be idle to specify and recommend a number of treatises on the leading branches of commerce and manufactures. They are to be found in all the popular "Encyclopædias" and "Cabinet" and "Family Libraries," which have been published during the last ten or twelve years ; and the best of them can be pointed out to the reader by some duly-qualified friend ; one work, however, the author does strongly recommend, from long personal experience of its utility—Mr. Mac Culloch's *Dictionary of Commerce and Commercial Navigation*. It is a very thick octavo volume, closely printed, with numerous maps, and contains an immense quantity of authentic and well-digested informa-

tion on all subjects of domestic and foreign trade and commerce, on banking, joint-stock companies, exports and imports, book-keeping and accounts, &c. &c. &c. It is, in fact, a *mine* of practical knowledge for the practical lawyer. In perusing "cases" and "briefs" in commercial causes, drawn up by skilful and experienced attornies and solicitors, the young lawyer will often find himself given credit for knowing far more of such matters than he *does* know; and he may often be unable to consult those who could explain what is puzzling him. In Mr. Mac Culloch's Dictionary, he will not often be disappointed upon such occasions: *Experto crede*.

III. NATURAL PHILOSOPHY. A single glance at one great and continually-increasing source of modern litigation, viz., the PATENT LAWS—will convince the reader, most ignorant or sceptical upon the subject, of the paramount necessity which exists for a Barrister's acquaintance with, at all events, the leading principles of Physical Science; unless indeed he be content to resign all pretensions to incomparably the most distinguished and lucrative species of practice which the Bar affords. One distinguishing characteristic of the age, is the untiring energy and ingenuity with which the profoundest researches of physical science are sought to be made immediately and directly applicable to the conveniences and necessities of ordinary life—promotive of personal enjoyment, and, on these accounts, naturally a strong stimulant to mercantile speculation. Look, for instance, at that branch of science in which such surprising advances have been made within the last very few years, as afford a prospect of incalculable and indefinite further discoveries and changes, not only in chemistry, but in other departments

of science, viz., ELECTRICITY and GALVANISM. One of its most ingenious and brilliant applications, viz., to gold and silver plating, has recently been made the subject of several lucrative *patents*; and whenever that result ensues, another follows almost inevitably,—namely, litigation. From what does such litigation arise? From the conflict of scientific wits with each other, called forth and sharpened by the legitimate love of gain; challenging the right of the fortunate,—often, however, most unfortunate, patentee—to the exclusive enjoyment of his privileges; affirming the want of novelty in his alleged discovery or invention, or that a subsequent kindred discovery or invention is a distinct and independent one, equally entitling *its* discoverer or inventor to exclusive advantages, without their being regarded an infringement of those granted to another. What a fertile source of difficult but interesting litigation is here opened! On what subtle and delicate scientific distinctions may, and at this moment do, depend—large fortunes—an immense amount of capital? The rest of this volume might be easily filled with illustrations of the truth of these remarks. Passing over the great and increasing number of patents for improvements in machinery, new applications of the steam-engine, &c. &c., out of which continual and expensive litigation arises, look at the very great variety of mechanical, physical, and chemical applications which have formed the subject-matter of patents for improvements in the manufacture of iron; e. g. *Lord Dudley's* patent [in 1619] for smelting iron ewre [i. e. ore], and making it into cast-works, or bars, with sea-coals, or pit-coals:*

* It may be worth mentioning, that till then iron ore had been smelted with *wood* fuel: but in consequence of the immense consumption of timber

Cort's patent, extending that invention: *Hill's*, for cinder-iron: *Neilson's*, for the hot blast-iron: and *Crane's*, for the anthracite iron! What vast sums have been spent within the last few years upon litigation, in *this* single species of patent rights! If the student will attentively consider the following classification of patent inventions,* he will be able to form a tolerably just notion of the occasions for litigation to which the Patent Laws must give rise:—

“ I. An arrangement, combination, or composition of matter; the *particular* arrangement, combination, or composition, being the essence and substance of the invention.

“ II. An arrangement, combination, or composition of matter, with the view of carrying out into practice certain truths, laws, or principles; the particular arrangement, combination, or composition not being of the essence or substance of the invention, except as in connection with, and subsidiary to, the truths, laws, or principles which are to be so carried out into practice.

“ III. An application and adaptation of natural or known agents, and of known substances, or things.” †

Let the student but consider the above classification, and glance at the condensed illustration of it, afforded by the cases enumerated in the little work from which it is taken; and he will be satisfied of the truth of the proposition with which we set out—that no Barrister, aiming at

occasioned by this process, it was greatly restrained by Acts of Parliament in 1581, (stat. 23 Eliz. c. 5), and again in 1585 by stat. 27 Eliz. c. 19. It was shortly after this, that Lord Dudley made the most important discovery in question.

* Webster on the Subject-matter of Letters Patent for Inventions, p. 11.

† Id. Ib.

the better and higher kind of practice, can safely dispense with the best information on scientific subjects which his means and opportunities may afford. Let him go down to the Privy Council at Whitehall, on any day during the Session of that exalted tribunal; let him go to Westminster Hall, on the occasion of some important patent cause being tried (and scarce ever a 'sittings' occurs without several), and what will he there behold? The Court crowded with the most distinguished practical scientific men in the kingdom, called to give their opinions and their evidence, often of a most abstruse and conflicting character. These gentlemen must be examined, cross-examined, re-examined; and their evidence thoroughly sifted and commented upon, in addresses to the lords of the Privy Council, or in cases of trials, to the jury. These are generally very formidable witnesses, as may be easily believed—almost all of them being able men, trained to the utmost degree of practical expertness and exactness in their respective departments, which range in the highest regions of pure and mixed science*—matters of daily familiarity to *them*; and the occasion one in which their

* Only a few months ago was tried a case at Westminster, in which the question turned chiefly on the nature of different sections of the *cube*, *i. e.* at different angles, with reference to the greater or less degree of strength and security, as applied to wood-paving, which they afforded. Several eminent mathematicians and engineers attended at the consultations, to explain to counsel the precise nature of the points in dispute (and with which the leading counsel appeared in court, a day or two afterwards, as familiar as if he had been engaged in the study of geometry all his life): and both there, and subsequently in court, were to be heard bandying about—'stereotomy of the cube'—'parallelopiped,' and so forth,—till the hearer might have imagined himself in a mathematical lecture-room at college!

professional reputation, being often considered by them to be at stake, and they, moreover, stimulated by opposition and rivalry with each other, often exhibit a remarkable degree of pertinacity and tortuosity. Yet they are not infrequently utterly foiled by the coolness, self-possession, acuteness, skill, and adroit use of scientific knowledge, evinced on these trying occasions by eminent counsel. Let the student (while reading these pages) ask himself the plain question—‘Suppose, to-morrow, or the day after, I were entrusted with a brief in such a case—what would become of me?’—‘But,’ he may answer, ‘what client would be such an ass as to entrust me with such a brief?’—‘Softly, my friend,’ we reply, ‘we are not speaking of such an absurdity as your being entrusted with the *conduct* of such a case—whatever be your talents or acquirements, that may *never* fall to your lot; but suppose, through the influence of lay or professional friends, you be given a second, a third, or even fourth brief, in a case where very many scientific witnesses must be called, some of whom it must fall to *your* lot to examine, how can you get on, if ignorant of the mode of handling such topics—unable readily to adopt the requisite phraseology, or comprehend the scope of the answers? You must either appear a hesitating bungler, whose witness his leader must take out of his hands—a most mortifying and dangerous, but in such case, absolutely necessary interposition—or make no attempt to examine at all! What a testimony, moreover, to your incapacity may your brief exhibit—your notes being a confused, unintelligible bungle, from beginning to end—of no service to your client, because you did

not really understand, and, consequently, could not correctly report, what had taken place! Imagine your clients, subsequently, examining your brief, anxious to obtain from it that for which alone (except possibly from pure favouritism) you had been employed in the case; viz., a correct account of what had taken place. What, think you, is likely to be the effect of such a discovery as that which we have intimated? Suppose, on the contrary, a young counsel should exhibit, on such an occasion, a competent acquaintance with scientific knowledge, displayed with self-possession, and a business-like air; imagine, too, a frequent occurrence, that his leader, in the multiplicity of his engagements, is absent, when the moment has arrived for addressing the privy council, or jury! What, if his junior be able to acquit himself with anything like judgment and spirit? Who can tell the effect of such an appearance? Some eminent attorney or influential scientific witness, or spectator, may be present, who will not forget it! Again: it is well known that several, if not many of the present judges are expert mathematicians, who can see at a glance the true scientific point involved, and sometimes surprise both witnesses and counsel by the readiness, rapidity, and exactitude of their knowledge: is not this another source of danger, to an incompetent counsel? Some time ago, in the author's presence, during the trial of a cause of this description, — "Oh, I see how it is," — suddenly exclaimed the judge, taking a sheet of paper, on which he wrote for about a minute, and then handed it down to the counsel — "there it is—*quod erat demonstrandum!* — The witness is perfectly correct, and we were quite mis-

taken!" The counsel took that ugly slip—gazed for a moment or two, with an utterly puzzled air, at the algebraic characters which it contained, then at the judge—handed it back—and shrugged his shoulders—muttering, "Well, I dare say your lordship is right—but what then, my lord?" '*What then?*'—Why it was destructive of his entire case—and the verdict went accordingly; and a cruelly significant smile was perceptible among the unemployed Bar present, two or three of them being the ablest mathematicians whom Cambridge or Oxford could supply.—Let it not be imagined, however, that the necessity of possessing a competent degree of scientific knowledge, is confined to '*patent*' cases. There are a great number of other cases which could readily be enumerated, in which such knowledge is not only required, but indispensable; and without which the young counsel can make neither a safe nor a creditable appearance.

There is now lying before the writer, a printed copy * of the short-hand writer's notes of a remarkably interesting insurance case (*Severn & Co. v. The Imperial Insurance Company*), which came on for trial before the late Chief Justice of the Common Pleas (Dallas), at Guildhall, on the 11th of April, 1820, and lasted three days. The plaintiffs were sugar-refiners; and had sustained a loss

* Published in a thin 8vo volume, from Mr. Gurney's short-hand notes, in 1820, by John Major, Skinner Street, London, and T. Kaye, Castle Street, Liverpool. If this volume is now to be procured, it will afford a very lively and instructive illustration of the truth of the representations in the text. Whenever similar trials are published (as they often are), they should be sought after with avidity, and thoroughly studied.

of 70,000*l.* by a fire which had occurred the year before. A part of this sum (8000*l.*) they sought to recover from the defendants' office, in which they were insured to that extent. The office, however, resisted payment on the ground that, "the loss was not occasioned by any risk included in the policy, but by a mode of boiling the sugar *by means of heated oil*, introduced without any notice to, or the consent of, the defendants, whereby their risk and hazard were greatly increased." This was in short, a new process—which, it was contended, most seriously increased the risk of the insurers. The Solicitor-General (now Lord Lyndhurst, the Lord Chancellor), led for the plaintiff; and Mr. Scarlett (the late Lord Abinger), for the defendant: and all the great chemists living (including one now alive, and whose successful researches have reflected imperishable lustre upon his country—Mr. Faraday), were called into the witness-box, and examined, cross-examined, and re-examined, and their testimony compared and commented upon with great skill by the two eminent persons who conducted the case. The conflict of the scientific evidence was very remarkable—and was thus commented upon, in summing up the case to the jury, by the able judge:—

"We have been now employed in the examination, during two days, of a great number of the most intelligent persons whom this country or Europe can produce. I am myself more or less acquainted with all the writings of every one of the gentlemen produced—from this I know their information, I know their talents: and whether my time may have been well or ill employed, I will not say, but I am proud to acknowledge, that from their labours, I have received at times a considerable degree of

pleasure ; but I must add, that these two days, thus employed, are not days of triumph, but days of humiliation for science ; for when I find that their science ends in this degree of uncertainty and doubt, when men of the first intelligence, a constellation of talents of such brightness as this, is brought forward to shine upon us, and when I observe that they are drawn up in martial and hostile array against each other, how is it possible for a common man like me, to form, at a moment, an opinion upon such contradictory evidence ? I am at best in a state of half knowledge, which would be worse than ignorance, if I were to apply it, or presume to apply it, in a Court of Justice, to the real and momentous transactions of mankind. I never have and never will follow, that course ; those who walk in the twilight should proceed with caution. You will not, therefore expect any opinion upon this part of the case from me, I can form none—volumes have been spoken upon it, and I foresee, without being blessed with the spirit of prophecy, that volumes will be written upon it,—and so they ought, for the elucidation of science, and the enlightening of mankind : because experiments of this nature are new. In this case, therefore, it is quite impossible for me to be of any assistance to you ; speaking for myself, I should say, that, at the most, my mind is conducted to that point at which I am thankful, for myself, my mind may rest ; it is conducted up to a degree of doubt—to me it is permitted to doubt, to me it belongs to doubt, if I entertain doubts which require more examination before I can come to a sound conclusion : but to you, it is not permitted to doubt ; you may doubt, but *your* doubt cannot end in doubt, for however much you may doubt, with a degree of

assurance more or less strong, still *you* must DECIDE; and to you, therefore, whose duty it is to decide, I leave it, upon this contradictory evidence, to say, whether, you do think, or do not think, that the process in question is attended with more risk, than the former process made use of: that, upon this part of the case, is the issue which you have to try." *

It were to be wished that any reader sceptically disposed as to the necessity existing for such knowledge on the part of counsel, as is here contended for, had either been present at this trial, or could read the report of it, or of one of the many similar trials occurring at the present day. It would, however, be idle to accumulate illustrations of what probably will not be doubted by any intelligent reader: and what conclusion can such a one draw from that which has gone before, than this—namely, the necessity of early acquiring at least correct *general* notions concerning the pure and mixed sciences—such as will enable him pretty readily to comprehend the drift of cases such as those above alluded to—and make a creditable appearance, not in public only, but before his own clients, and the scientific advisers of those clients? "I'll take care that —— shall never be counsel where I have a voice in deciding," said, a few years ago, an eminent scientific person, who was deeply interested in the issue of a particular case.—"He knows no more of mechanics than an owl—and has entirely missed both the great points in the case! I shall make our people immediately give —— [the opposite counsel] a general retainer!"—And so it was done.

Knowledge of this kind is almost as requisite at the

* Report, &c., pp. 246-7.—The plaintiffs recovered a verdict for 718*l.* 2*s.* 6*d.*

Equity as the Common Law Bar ; but with this vast advantage in favour of Equity counsel—that there is no wrestling openly in court, with the *vivâ voce* testimony of skilful and learned witnesses standing in the jury-box. In the former case, such evidence comes cut and dried (so to speak) beforehand upon paper, in the shape of affidavits ; but even in that case, will be obvious the necessity and advantage of being possessed of sufficient knowledge to frame the requisite pleading and affidavits, and comment satisfactorily upon them in court.

Many of those who come to the Bar are most advantageously prepared to encounter such scenes, by the elements of physical science acquired at the Universities ; and if fortunate enough early to obtain such practice, quickly find their mathematical knowledge to be invaluable. But what is to be done by those who have not such advantages ? It would be idle to attempt (however one might be assisted by competent advisers) to chalk out for such persons a course of scientific reading, for several reasons which will occur to any reflecting reader. One is, that elegantly expressed by Horace—

“*Segnius irritant animos demissa per aurem,
Quàm quæ sunt oculis subjecta fidelibus, et quæ
Ipse sibi tradit spectator.*” *

It is next to impossible for even the ablest intellect to acquire any adequate degree of available knowledge from the mere study of books on physical science, however excellent may be such books, or resolute and persevering their reader's application. “No treatise on natural philosophy,” justly observes Dr. Arnott, in his ‘Elements of

Physics'—(a work now out of print, which was designed to go as far in this way as could be gone)—“can save, to a person desiring full information on this subject, the necessity of attendance on experimental lectures or demonstration. Things which are seen, and felt, and heard,—that is, which operate on the natural senses,—leave on the memory much stronger and more correct impressions, than where the conceptions are produced merely by verbal description, however vivid.”*

The first step to be taken by one conscious of his deficiency in this respect, is to acquire the elements of mathematics,—of algebra, and geometry ; for which purpose, a private tutor would be by far the most desirable means of instruction. The next step is one which the author would most strenuously recommend to the student—namely, a diligent attendance,—either during the period of pupilage, or at his leisure afterwards—upon two or three courses of lectures on chemistry and natural and experimental philosophy ; for which excellent opportunities are afforded at the Royal Institution in Albemarle Street, and at King's College. The lecturers at the former place, and the professors at the latter, are very able men ; the fees are moderate ; and the locality of the latter is most convenient to law-students. If arrangements could be made to deliver lectures in the evenings at King's College, the author is persuaded that many members of the legal profession would avail themselves of such a precious opportunity of acquiring, or refreshing former acquisitions of, this most important species of knowledge—knowledge which is becoming so universal,

* Elements of Physics, vol. i. Pref. xlviii. ; and *vide ante*, p. 15 note.

even among the inferior classes of society, as to place a member of the superior classes *on his mettle*—so to speak—and render a Barrister's ignorance peculiarly dangerous to him.*

There are two works which may, notwithstanding what has been said above, be cordially recommended to the reader. With the first, possibly, the reader is already familiar—the admirable “Preliminary Discourse on the Study of Natural Philosophy,” by Sir John F. W. Herschell, which was published in 1830, in a small 12mo. volume of 372 pages. Without doing more than alluding to the delight with which this work has been several times perused by the writer of these pages, he can assure the reader that he has frequently heard the most eminent scientific men speak of it as a singularly beautiful, accurate, and masterly performance. Its author will be universally admitted to be consummately qualified for such an undertaking—as far as the union of exact and profound science,

* Imagine a case analogous to the following to occur in the present day, and be duly chronicled by the newspapers!—“It is well known,” says the late Mr. Chitty (*General Practice of the Law*, vol. ii. p. 321, c), “that a judge was so entirely ignorant of insurance causes, that after having been occupied six hours in trying an action on a policy of insurance upon goods (*Russia duck*) from Russia, he, in his address to the jury, complained that no evidence had been given to show how Russia ducks (mistaking the *cloth* of that name for the *bird*) could be damaged by sea-water, and to what extent!!!”—Dr. Arnott, in his *Elements of Physics* (vol. i. p. 48, 3d ed.), gives an amusing instance of the effect of entire ignorance of the laws of mechanics, which was paralleled in a court at Westminster. very recently : “A young and not yet skilful Jehu, having run his phaeton against a heavy carriage on the road, foolishly and dishonestly excused his awkwardness, in a way which led to his father's prosecuting the old coachman for furious driving. The youth and his servant both deposed, that the shock of the carriage was so great as to throw them over their horses' heads ; and thus they lost the cause, by unwittingly proving that the *faulty velocity was their own !*”

with elegant and varied accomplishments, and refined taste can be considered as constituting such qualification. The style is severely chaste, and not obscured by technicalities. The work is divided into three parts, treating :— “ I. Of the General Nature and Advantages of the Study of the Physical Sciences : II. Of the Principles on which Physical Science relies for its successful prosecution, and the rules by which a systematic examination of Nature should be conducted—with illustrations of their influence as exemplified in the History of its Progress : III. Of the Subdivision of Physics into distinct branches, and their mutual relations.” Under these divisions Sir John Herschel takes a survey of the whole region of physical science, contrasting its present with its former state, and exhibiting the “ causes of its rapid actual advance, compared with their progress at an earlier period,”—in a very striking manner. This last topic constitutes the closing chapter of the work—which the author has infinite satisfaction in commending to the attention of the student. It is a work which might easily be amplified into many volumes : but condensed as it is, supplying a rich feast to an attentive and contemplative mind.

One other work—amongst the shoal of those on the same subject which have made their appearance within the last few years—is worthy, in the author’s opinion, founded upon a practical acquaintance with the work, of the special attention of the student, who may have been convinced by the foregoing observations of the necessity of early attention to the topics there discussed. The book referred to is entitled “ Illustrations of Mechanics, by the Rev. H. Moseley, late Professor of Natural Philosophy and Astronomy, at King’s College,

London." This is a small 12mo. volume of about 400 pages, published in 1839, for a trifling sum, and far better calculated for the practical uses of the law-student than any work, with which the author is acquainted, or which he has been able to discover. The high philosophical reputation of Professor Moseley is a sufficient guarantee for the accuracy of the work. He thus explains its scope and object :—

"The author has proposed to himself the development of that system of experimental facts and theoretical principles on which the whole superstructure of mechanical art may be considered to rest; and its introduction, under an available form, to the great business of practical education. To effect this object, and to reconcile, as far as it may be possible, the strictly scientific with the popular and elementary character of the undertaking, a new method has been sought, the nature of which is sufficiently indicated by its title—'Illustrations of Mechanics.' The work consists, in fact, of a series of illustrations of the science of mechanics, arranged in the order in which the parts of that science succeed each other, and connected by such explanations only, as may serve to carry the mind on from one principle to another, and enable it to embrace and combine the whole—a plan which leaves to the author the selection of such elements only of his science as are capable of popular illustration, and as come within the limits of practical instruction; and which enables him to exclude from his work all abstract reasoning, and mathematical deduction.

"Throughout, an attempt is made to give to the various illustrations an entirely elementary and practical character; and each illustration forming a short distinct article, the

subject of which is enunciated at the commencement of it, the work has assumed a broken form, adapted peculiarly, it is conceived, to the purposes of scholastic instruction." * *

* * "If we conceive space spreading out its dimensions infinitely, still, through all its interminable fields, does science show it to us peopled with matter—stars upon stars innumerable—a vista in which suns and systems *crowd* themselves, and to which imagination affixes no limit. If in like manner, we conceive space to be infinitely divided—as its dimensions grow before the eye of the mind yet less and less—still does it appear a region peopled with the infinite divisions of matter.

"On either side is an abyss—an interminable *expanse*, through which the creative power of God manifests itself, and an unfathomable" [inaccessible?] "*minuteness*."

"It is in this last mentioned region, of the inaccessible minuteness of matter, that the principles of the science treated of in the following pages, have their origin. Matter is composed of elements, which are inappreciably and" [apparently?] "infinitely minute; and yet it is within the infinitely minute spaces which separate these elements that the greater number of the forces known to us, have their only sensible action. These, including compressibility, extensibility, elasticity, strength, capillary attraction and adhesion, receive their illustration in the *first THREE* chapters of the following work. The *FOURTH* takes up the science of Equilibrium, or Statics; applies in numerous examples the fundamental principles of that science, the parallelogram of forces, and the equality of moments; then passes to the question of *stability*, and to the conditions of the resistance of a surface; traces

the operation of each of the mechanical powers under the influence of friction; and embraces the question of the stability of edifices, piers, walls, arches, and domes.

“The FIFTH chapter enters upon the Science of Dynamics. Numerous familiar illustrations establish the permanence of the force which accompanies motion—show how it may be measured—where in a moving body it may be supposed to be collected—exhibit the important mechanical properties of the centres of spontaneous rotation, percussion, and gyration—the nature of centrifugal force, and the properties of the principal axes of a body’s rotation—the accumulation and destruction of motion in a moving body, and the laws of gravitation.

“The LAST chapter of the work opens with a series of illustrations, the object of which is to make intelligible, under its most general form, the principle of virtual velocities, and to protect practical men against the errors into which, in the application of this universal principle of mechanics, they are peculiarly liable to fall. It terminates with various illustrations of those general principles which govern the reception, transmission, and application of power by machinery, the measure of dynamical action, and the numerical efficiencies of different agents—principles which receive their *final application*, in an estimate of the dynamical action on the moving and working points of a steam-engine.”

Though, however, there were works even of far greater pretensions than the two here recommended for perusal, the author would close this section of his labours with reiterating the words, “Lectures ! Lectures ! Lectures !”

SUCH is the course of general study which the author ventures to lay down, after much consideration, experience, and anxious inquiry, for the guidance of his younger readers. The difficulty of the task which he has undertaken, can be appreciated only by those who may have preceded him in similar attempts. However his suggestions may be received, he has felt impelled to offer them, by convictions produced during many years' attentive observation of the various classes of students who have from time to time entered the legal profession: and in conclusion, the author would whisper, in a friendly spirit, into the ears of any conceited and self-satisfied person who may chance to look at these pages, a caution uttered by a great man—

“MULTI AD SAPIENTIAM PERVENISSENT, NISI SE JAM
PERVENISSE PUTASSENT!”

CHAPTER VI.

ON THE FORMATION OF A LEGAL CHARACTER.

PART III.—MENTAL DISCIPLINE.

NEXT to the inculcation, upon his son, of the sublime and all-important truths of religion, an intelligent father's very earliest efforts should be directed judiciously, gradually, and perseveringly, to the *mental discipline* of that son; especially if the father's position in life warrant him in looking forward to the introduction of his son into one of the learned professions,—but above all, into that of THE BAR. The earliest years of childhood very seldom receive that species and degree of attention which they imperatively require. Children are disposed to observe, and to consider, far more—they begin to *think* much earlier—than even a watchful parent often gives them credit for: but their little efforts in this direction, so far from being tenderly and vigilantly assisted, are too often either utterly neglected, or disregarded, by anxiously-occupied fathers, or overpowered and confounded by the premature and mechanical acquisition of knowledge. Those who have been accustomed to observe very young children, are often surprised at their pertinacious curiosity to find out the connection between cause and effect in

ordinary occurrences, and the *reasons* on which dogmatic information is based. Without unduly prosecuting this interesting and important topic, the author—himself a parent—would earnestly recommend parents to begin betimes, but discreetly, with the effort to form a *habit of attention* in their children—as one which will, in due time, prodigiously abridge the difficulty both of their acquiring, and of communicating to them, knowledge, and early train the mental faculties to encounter successfully with difficulty. Though nothing can be more cruel or perilous than to exact *too much* from a child in the way above suggested, yet a very great deal more may be safely and happily effected than is attempted in one out of a hundred instances. It is a just observation of the distinguished philosopher already quoted—Dugald Stewart, that “in general, where *habits of inattention*, and an incapacity for observation, are very remarkable, they will be found to have arisen from some defect in early education:”* and the root of that defect, it is conceived, is often to be found in the prevalent error of cramming the memory, instead of exercising the understanding, of youth. These and similar considerations should be anxiously pondered by the parent who meditates sending a son to the Bar, if he would diminish the difficulties to be encountered by that son—and give him a fair, or a superior, chance of success and distinction.—How few young men who are considered to have enjoyed the advantages of the best education, have been really taught to THINK! How many only affect to think: how many are given credit for being thinkers, who really have not a shadow of right to the title! How fatally easy it is for youth to slip into a slovenly habit of

* Elem. of Philos. c. vi. § 7, p. 469 (6th ed.)

mind, which is imperceptibly, and too often irretrievably, incapacitating them from any future intellectual exertion of importance! Sound an alarm, supine parent, in the ears of your son, whom you are preparing for inevitable failure,—for the humiliation of your family pride,—the disappointment of all your fond, but idle, hopes and expectations!—Say to him in the language of the stern Persius—

“—— Tibi luditur ! Effuis, amens !
 Contemnere !—Sonat vitium percussa, malignè
 Respondet viridi non cocta, fidelia, limo.
 Udum et molle lutum es : nunc ! nunc ! properandus, et acri
 Fingendus siue fine rotâ !” *

Enlist early his own feelings in your behalf—convince his own judgment—and be YOURSELF, if fortunately capable of it, the happy instrument of conferring so precious a boon—one for which he will thank you to the latest moment of his life!—“The pains and application,” says Roger North, “must be in the YOUTH ; and *that gone, the opportunity is lost*. A man has but one youth, and considering the consequence of employing that well, he has reason to think himself very rich ; for that gone, all the wealth in the world will not purchase another. It would seem strange, if experience did not confirm it, that a man’s age should be like the seasons of the year : for if you sow in harvest, when are you to reap? The spring is the time to commit seeds to increase ; and if a man *get not his skill when young*, he is like never to have any at all ; for the soil becomes arid as age advances, and whatsoever is scattered upon it, takes no thrift, but perishes and starves.” †

Consider for a moment for what a profession—in that of

* Persius, Sat. iii. 20—24.

† Disc. Stu. Laws, pp. 5, 6.

the Bar—you are destining your son—one in which, as already intimated,* the remainder of his life is to be occupied in downright hard *reasoning*: and in that, how much is implied! “Legal studies,” says an acute writer, already quoted (Mr. Ritso), “eminently invigorate and fortify the mind’s noblest faculty—the power of attention: they discipline the understanding, excite discrimination, give activity and acuteness to the apprehension, and correct and mature the judgment.”† This is indisputably a just panegyric: but how very long may it not be before these effects become apparent in the student? What a disposition—what a capacity, for energetic and persevering application is presupposed, and how comparatively few possess it! There are some undoubtedly blessed with a clear strong head, an indomitable will, and a natural aptitude for practical thinking: but there are others who possess high mental endowments, a rich imagination, and great powers of memory, and of eloquence, but whose understanding is either not so strongly developed, or has so long lain uncultivated and undisciplined, as now to oppose a very serious barrier to their actual progress—to fetter the exercise, and obscure the lustre, of their other faculties and qualifications. When we say that the remainder of such persons’ lives is to be devoted to reasoning—to reasoning *publicly* on the most important transactions of human life—often on the spur of the moment—on questions of great difficulty—against skilful and experienced opponents (not school-boys, be it observed—not fellow collegians—but against MEN, and men of superior and long-practised powers)—and before experienced and sagacious judges—we say that only which

* Ante, pp. 174-5.

† Ritso’s Introd. p. 7.

is obvious to even a cursory observer of the profession. Of the peculiar *nature* of legal reasonings, it occurs to us to present to the student the very striking account of them given by Dr. Paley ; from which may be formed a lively and accurate notion of the species of mental exertion for which they are desirous of preparing themselves.

“ After all the certainty and rest which can be given to points of law, either by the interposition of the legislature or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still, namely,—*the COMPETITION OF OPPOSITE ANALOGIES*. When a point of law has been once adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute ; but questions arise which resemble this, only indirectly and in part, in certain views and circumstances, and which may seem to bear an equal or greater affinity to other adjudged cases ; questions which can be brought within any fixed rule, only by analogy, and which hold a relation, by analogy, to different rules. It is by the urging of these different analogies that the contention of *THE BAR* is carried on : and it is in the comparison, adjustment, and reconciliation of them with one another ; in the discerning of such distinctions ; and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger ; that the sagacity and wisdom of *THE COURT*, are seen and exercised. * * * Whoever takes up a volume of reports will find most of the arguments it contains capable of the same analogies ” [as the instance which he had given] ; “ although the

analogies, it must be confessed, are sometimes so entangled, as not to be easily unravelled, or even perceived ! ” *

Let us now, however, proceed to the task undertaken in this section, viz., that of offering some helps towards supplying that early negligence, and those deficiencies, which have resulted in the sad spectacle of a volatile and undisciplined mind, incapable of attention and close thought. We will set out with the cheering assurance of the most illustrious of philosophers :—

“ *There is no stond, or impediment in the wit,*” says Lord Bacon, “ *but may be wrought out by fit studies : like as diseases of the body may have appropriate exercises ;* bowling is good for the stone and reins, shooting† for the lungs and breast, gentle walking for the stomach, riding for the head, and the like. So if a man’s wit be wandering, let him study the mathematics ; for in demonstrations, if his wit be called away never so little, he must begin again ; if his wit be not apt to distinguish, or find differences, let him study the schoolmen, for they are ‘*Cymini sectores* ;’ if he be not apt to beat over matters, and to call upon one thing to prove and illustrate another, let him study the lawyers’ cases : so every defect of the mind may have a special receipt.” ‡

Lord Bacon’s encomiums on the study of MATHEMATICS, as affording the best discipline for an ill-regulated mind, are numerous and emphatic. In addition to the one contained in the foregoing paragraph, he has said, in another of his works, “Pure mathematics do remedy and cure many defects in the wit and faculties intel-

* Moral and Political Philosophy. Book VI. c. viii.

† By “shooting”—here, is obviously meant, the use of the *bow and arrow*.

‡ *Essays—Of Studies.*

lectual; for if the wit be dull, they sharpen it; if too wandering, they fix it; if too inherent in the sense, they abstract it." And again, elsewhere—"If a child be bird-witted, that is, *hath not the faculty of attention*, mathematics give a remedy thereto; for in them, if the wit be caught away but a moment, one is to begin anew." And yet again:—"As tennis is a game of no use in itself, but of great use, in respect it maketh a quick eye, and a body ready to put itself into all postures; so in the mathematics, *that use which is collateral and intervenient*, is no less worthy than that which is principal and intended."* Professor Leslie, also, a distinguished philosopher, lately deceased, has borne decisive testimony to the value of the study of geometry, if regarded even as a means of mental exercise only. "The demonstrations left by the Greek geometers, are models of accuracy, clearness, and elegance—admirably calculated for training the minds of youth to habits of close reasoning and luminous arrangement."† It were, however, superfluous to accumulate testimonies to the same effect; yet one more we will cite, because it is brief, and proceeded from a very great ornament of our own profession, the late Lord Ashburton (formerly Mr. Dunning):—"GEOMETRY will afford to the young lawyer the most apposite examples of close and pointed reasoning."‡ A very striking illustration of the truth of this observation was communicated a few years ago, by the party concerned, to the author. A gentleman

* Advancement of Learning. Works, vol. ii. p. 145.

† Fourth Preliminary Dissertation on the Progress of Mathematical and Physical Science during the 18th Century. § 1.—Speculative Mathematics.—*Encyc. Britann.* vol. i. p. 580.

‡ "Letter to a Young Gentleman," &c. &c.

of superior natural talent, having had an average (but not a college) classical education, was, in his twenty-first year, desirous of coming to the Bar. He had read much of what is called "light literature," but indolently and discursively. He had even written not a little, nor unsuccessfully, for the press; and had several times found opportunities for speaking in public, on political subjects; acquitting himself, on such occasions, very successfully—being fluent, ready, and ingenious. In short, he had contrived to pass among a pretty large circle of acquaintances, as a "decidedly clever man." Some casual observation made by a Cambridge friend of his, in his hearing, concerning the use of geometry, in testing the strength of the reasoning powers, induced him, on returning that evening to his lodgings, to take up a copy of Euclid, which he recollected had long lain on one of the upper shelves of a bookcase belonging to his landlord. After glancing over the Definitions, Axioms, and Postulates, he, in like manner, and in "*his then usual superficial way*"—these are his own words to the author, whom he has permitted thus to mention his case—read over the first problem, and 'saw nothing so *very* wonderful in it.' Some impulse or other moved him to read it again, and very attentively; that induced him, after a thoughtful pause, to read it a third time, still more attentively than before. After this he rose from his chair, 'in a sort of trepidation,' and felt that he had suddenly made a great discovery; viz., that till then 'he had known no more than a calf, of the connection between premiss and conclusion,—in short, of *real reasoning*!' He acted with singular promptitude and decision upon that impression; addressed himself immediately to the study of Euclid, overcoming a thousand

risings of weariness, disgust, and even despair, till he had fairly mastered the first six books. Then he attacked Algebra; went to college pretty well prepared, and acquired considerable distinction there. 'I never now,' says he, 'think of Euclid, who taught me first that I had an understanding which I could not use, and then showed me how to use it, without feeling all that reverence and affection which are due to so august an instructor. I am conscious that he changed the whole character of my mind, and gave me my only chance of success in life. By the time that I had really mastered the first three books, not with the design of becoming a mathematician, but simply of learning to *reason*, I became conscious of a very great improvement in my faculties; occasioning me unspeakable satisfaction, mingled with secret shame and vexation at the frivolous, indolent, and superficial habits of thought with which I had been all my life content.' If the reader could be informed of the name of the gentleman here alluded to, (but which, it is needless to say, has been confided to the author confidentially,) he would be aware of the value of this little trait of autobiography. The author is acquainted with one or two other instances of the signal advantage derived from a study of Euclid,—pursued only to the extent, and with the object, above mentioned—as eminently calculated to apprise one instantly of existing deficiencies, to test the native strength of the intellect, to fix a wavering one, to invigorate a weak one. The exquisite and faultless logic with which each demonstration is fraught,* cannot fail of producing the

* "It is a remarkable fact in the history of science," observes Professor Playfair, in his admirable edition of Euclid,—which is the one best adapted for students—"that the oldest book of elementary geometry is still consi-

happiest effect upon a mind of even but average capacity, bent upon becoming familiar with the process. But mark—it is possible that the student may fancy he is attaining this object, though all the while he is really doing nothing but *committing to memory*: his REASONING faculties being not appealed to, but utterly unconcerned in the operation, and, in fact, torpid and dormant. This would be a very sad mistake, indeed: yet is it one of too frequent occurrence. “One who does not understand the *principles* of Euclid’s demonstrations,” justly observes Dr. Whately,* “however much he may have learnt by rote, knows absolutely *nothing* of geometry; unless he attain this point, all his labour is utterly lost; worse than lost, perhaps, if he be led to believe that he has learnt something of a science, when, in truth, he has not; and the same is the case with logic, or any other science * * There are some persons (probably not above one in ten, of such as have, in other respects, tolerable abilities) who are physically incapable of the degree of steady abstraction requisite for *really embracing the principles* of logic, or of any other science, whatever pains may be taken by themselves, or their teachers; but there is a much greater number, to whom this is a great *difficulty*, though not an impossibility.” These remarks are equally correct when applied to the case of one desirous of studying geometry or mathematics, in order to acquire

dered the best; and that the writings of Euclid, at the distance of two thousand years, continue to form the most approved introduction to the mathematical sciences. This peculiar distinction the Greek geometer owes to the elegance and correctness of his demonstrations, added to an arrangement most happily contrived for the purposes of instruction: advantages which, when they reach a certain eminence, secure the works of an author from being forgotten, more effectually than even originality of invention.”—Playfair’s Elements of Geometry (Euclid), Pref. iii.

* Logic, Pref. xx. (3d ed.)

a practical knowledge of them, and to that of one seeking from them that "collateral and intervenient use," spoken of above by Lord Bacon; viz., the exercise and discipline of the reasoning powers. It is possible to commit accurately to memory some twenty or thirty theorems, without having had a glimpse even of their real meaning and principle. Many years ago a member of the Bar, before going to the University, had so "*got up*," as he conceived, the first six books of Euclid, as to be able to repeat them, and draw the figures, from memory, with rigid accuracy; and (as he laughingly assured the author, in mentioning the circumstance) 'began to look somewhat anxiously towards a *senior wranglership*!'—'Did you read with a tutor?' inquired a friend, himself a tutor at one of the colleges at Oxford. 'Oh! I read with no one—I got them up alone.'—'What did you do for the *deductions*?' inquired his friend. 'Deductions!' echoed the other, with surprise. 'Yes, did you—I mean—ever try to *apply*—to *work* with the problems and theorems which you had got up so well?'—'I—I—don't know what you mean,' was the reply, with a somewhat disconcerted air. His friend took a sheet of paper, and with his pencil, scarce able to restrain a smile passing over his features, for he shrewdly suspected what was to follow, wrote down these words—"From a *given point, to draw the shortest possible line, to a straight line.*" Nothing, the author has been assured, could exceed the ludicrous sort of dismay with which this task was soon perceived to be too formidable for the powers of the party to whom it was proposed. No way whatever of doing it occurred to our friend; as he acknowledged, after a long pause, with great vexation. 'Probably, it depends on some principles which I have not yet learnt,'

said he. 'No—it may be done by the assistance of two theorems in the first book—the 19th and 32nd—of Euclid.' With this new light our friend again addressed himself to the task—but again was utterly baffled; and when he was at length shewn a simple mode of solving the difficulty, he heaved a deep sigh of vexation and *alarm*; and fell into a state of despondency, of some weeks' duration, from which it took many zealous and friendly efforts to arouse him. This proved, however, as in the former case, a very *salutary* demonstration of the necessity of adopting, with firmness and judgment, some efficient mode of mental discipline.—Let not a young or timid reader of these pages be disheartened at their contents. The *memory* is not the only faculty which is improvable. The perception may be quickened, and the judgment strengthened,—the reasoning powers developed,—to an indefinite extent, by appropriate and persevering exercise. It is, in fact, with the mind, as with the body. If only *one set of muscles* should be exercised, that set alone will be developed and strengthened, at the expense of all the others: wherefore it is, that divers species of gymnastic exercises have been discreetly contrived, for the purpose of bringing fairly into play all the various muscles of the body. When these are judiciously adopted, how great is the advantage! And why not apply the same principle to mental exercise? Why should any, or any one, of the faculties of the mind, be exclusively, or all but exclusively, used and disciplined?

There are many persons of strong but undisciplined minds, who entertain an invincible repugnance to mathematical science; and who would rather—so to speak—take their mental physic in any other way. There *are* other, and effectual modes: and we have ventured, after

much consideration, and converse with men of great and acknowledged intellectual eminence—to suggest *one* such: but before coming to it, something must be necessarily premised concerning a subject already referred to in the former section of this chapter—LOGIC.

Can a man reason well who knows nothing of logic? No—says one of its greatest living professors—Dr. Whately; who accuses Locke of serious error in holding the contrary.* We believe that Dr. Whately's views are those now generally, and justly, prevalent. The following passage will be found very worthy of the student's meditation, before proceeding to the subject matter of the ensuing pages; in which one work of an illustrious writer will be found selected for elaborate exercitation: but that work is, in the opinion of a very eminent living logician (Dr. Copleston, the Bishop of Llandaff), "not intelligible, even in a single page, to one who is ignorant of LOGIC." The following, then, is the passage referred to:—

"In every instance in which we *reason*, in the strict sense of the word, *i. e.* make use of arguments, whether for the sake of refuting an adversary, or of conveying instruction, or of satisfying our own minds on any point; whatever may be the subject we are engaged on, a certain PROCESS takes place in the mind, which is ONE AND THE SAME in all cases, provided it be correctly conducted.

"Of course it cannot be supposed that every one is even conscious of this process in his own mind; much less, is competent to explain the principles on which it proceeds; which indeed is, and cannot but be, the case with every other process respecting which any system has been formed; the practice not only may exist independently of

* See the reasons assigned in Whately's *Logic*, Chap. I. § 1, "Analytical Outline of the Science."

the theory, but *must* have preceded the theory : there must have been language before a system of grammar could be devised ; and musical compositions, previous to the science of music. This, by the way, will serve to expose the futility of the popular objection against logic, that men may reason very well who know nothing of it. The parallel instances adduced, show that such an objection might be applied in many other cases, where its absurdity would be obvious ; and that there is no ground for deciding thence, either that the system has no tendency to improve practice, or that even if it had not, it might not still be a dignified and interesting pursuit.

“ One of the chief impediments to the attainment of a just view of the nature and object of logic, is the not fully understanding, or not sufficiently keeping in mind, the **SAMENESS** of the reasoning process in all cases. If, as the ordinary mode of speaking would seem to indicate, mathematical reasoning, and theological, and metaphysical, and political, &c., were essentially different from each other, *i. e.* different *kinds of reasoning*, it would follow, that supposing there could be at all any such science as we have described logic, there must be so many different species, or at least different branches of logic. And such is perhaps the most prevailing notion. Nor is this much to be wondered at ; since it is evident to all, that some men converse and write, in an argumentative way, very justly on one subject, and very erroneously on another ; in which again others excel, who fail in the former. This error may be at once illustrated and removed, by considering the parallel instance of arithmetic, in which every one is aware that the process of a calculation is not affected by the nature of the objects, the numbers of which are before us ; but

that (*e. g.*) the multiplication of a number is the very same operation, whether it be a number of men, of miles, or of pounds; though nevertheless persons may perhaps be found who are accurate in calculations relative to natural philosophy, and incorrect in those of political economy, from their different degrees of skill in the *subjects* of these two sciences; not surely because there are different arts of arithmetic applicable to each of these respectively.

“Others again, who are aware that the simple system of logic may be applied to all subjects whatever, are yet disposed to view it as a *peculiar method* of reasoning, and not, as it is, a method of unfolding and analysing our reasoning: whence many have been led (*e. g.* the author of the *Philosophy of Rhetoric*)* to talk of comparing syllogistic reasoning with moral reasoning; taking it for granted that it is possible to reason correctly, without reasoning logically; which is, in fact, as great a blunder as if any one were to mistake *grammar*, for a peculiar *language*, and to suppose it possible to speak correctly, without speaking grammatically. They have, in short, considered logic as *an art* of reasoning; whereas (so far as it is an art) it is *THE art* of reasoning; the logician’s object being, not to lay down principles by which one *may* reason, but by which all *must* reason, even though they be not distinctly aware of them:—to lay down rules, not which *may* be followed with advantage, but which cannot possibly be *departed* from in sound reasoning.”†

It will be clear, from the foregoing intimation of the nature and design of the logical system, and also from what has been already advanced in the foregoing chapter of this

* Dr. Campbell.

† Whately’s Logic.

work, that no law-student can safely neglect to acquire at least some general knowledge of logic: in support of this assertion, a great number of eminent legal authorities might easily be arrayed. On the other hand, however, it is equally necessary to bear in mind an observation of Seneca. '*Prospicienda ista, sed prospicienda tantum, et a liminè salutanda: hactenus utilia, animum si præparent, non detinent. Tamdiu enim istis immorandum est, quamdiu nihil animus agere majus potest. Rudimenta sunt nostra, non opera.*'

It can hardly be necessary to eulogise the concise and luminous treatise on Logic, of Dr. Whately, or spend many words in explaining how admirably it is adapted for the purposes of the student. He has pointed out with precision the true province of logic: has disentangled the science from the metaphysics with which it had so long been at once blended and confounded. It is very difficult to point out any portion of the work which may, by *our* student, be advantageously passed over: but perhaps the "*Analytical Outline of the Science*," Chap. I. (pp. 18-53) and Chap. III. "Of Fallacies,"* (pp. 135-212) may be mentioned as worthy of peculiar attention. The same distinguished author has also recently published a condensed and popular treatise on Logic, under the unpretending name of

* "The chemist," says Dr. Whately, "keeps by him his tests and his method of analysis, to be employed when any substance is offered to his notice, the composition of which has not been ascertained, or in which adulteration is suspected. Now a fallacy may aptly be compared to some adulterated compound; 'it consists of an ingenious mixture of truth and falsehood, so entangled, so intimately blended, that the falsehood is (in the chemical phrase) *held in solution*: one drop of sound logic is that test which immediately disunites them, makes the foreign substance visible, and precipitates it to the bottom.' "—*Whately's Elem. of Log.* [quoting from "An Exam. of Kette's Logic"] p. 31, 3rd ed.

"Easy Lessons in Reasoning"—which consists, as already stated, (*ante*, p. 176-7) of a small volume of 160 pages, and may be had for a couple of shillings! An observation occurs in this latter work which may be here usefully presented to the reader:—

"To frame indeed a system of rules which should equalise persons of all varieties of capacity, would be a project no less chimerical in this, than in other departments of learning; but it would certainly be a great point gained, if all persons were taught to exercise the reasoning faculty, as well as the natural capacity of each would permit: for there is good reason to suspect that on this point men fail quite as often from want of attention, and of systematic cultivation of their powers, as from natural deficiency: and it is at least worth trying the experiment whether *all* may not be, in some degree, trained in the right exercise of a faculty, which all, in some degree, possess, and which all *must*, more or less, exercise, whether they exercise it well or ill."*

CHILLINGWORTH is the writer whose works are recommended for the exertations of the student. Lord Mansfield, than whom there could not be a more competent authority, pronounced him to be "A PERFECT MODEL OF ARGUMENTATION."† Archbishop Tillotson calls him

* Pref. pp. iv. v.—The student who may have inclination, capacity, and leisure for the task, is referred to Mr. Mill's "Logic," recently published. It is entitled "A System of Logic, Ratiocinative, and Inductive; being a connected view of the Principles of Evidence, and the Methods of Scientific Investigation," by John Stuart Mill. In two volumes; London, Parker. An account of this work is given by an acute writer in Blackwood's Magazine for October, 1843 (vol. liv. pp. 415—430); where will be found an interesting view of the existing state of the controversy between the supporters and opponents of the *sylogism*: on which subject Mr. Mill's work contains an elaborate and masterly disquisition.

† Butler's Hor. Subsec.

"Incomparable—the glory of his age and nation."* Locke proposes, "For the attainment of right reasoning, the *constant reading* of Chillingworth; who, by his example," he adds, "will teach both perspicuity and the way of right reasoning, better than any book that I know; and therefore will deserve to be read upon that account, *over and over again*; not to say anything of his arguments."† Lord Clarendon, also, who was particularly intimate with him, thus celebrates his rare talents as a disputant:—"Mr. Chillingworth was a man of so great subtilty of understanding, and so rare a temper in debate, that as it was impossible to provoke him into any passion, so it was very difficult to keep a man's self from being a little discomposed by his sharpness and quickness of argument, and instances; in which he had a rare facility, and a great advantage over all the men I ever knew. He had spent all his younger time in disputation; and had arrived at so great a mastery, that he was inferior to no man in these skirmishes."‡

After reciting such splendid testimonials as these, the student, it is to be hoped, will feel eager to avail himself of the advantages to be derived from the great work which called them forth, *i. e.*, "THE RELIGION OF PROTESTANTS A SAFE WAY TO SALVATION." It was written in answer to one Matthias Wilson, a Jesuit; who (under the name of Edward Knott) had replied to Dr. Christopher Potter's Answer to him, in a work entitled "Mercy and Truth;

* Sermon vi. on Heb. xi. 6.

† "Thoughts concerning Reading and Study for a Gentleman."

‡ LIFE of Lord Clarendon. His Lordship adds, however, that Chillingworth, "with his notable perfection in this exercise, had contracted such an irresolution, and habit of doubting, that by degrees he grew confident of nothing, and a sceptic at least, in the greatest mysteries of faith."

or, Charity maintained by Catholics ;” and this brought down upon him a tremendous opponent—Chillingworth.* Both of them were consummate logicians, and, as may easily be believed, did all that the best wit of man could do, in defence of their respective churches. The poor Jesuit receives no quarter from his cold and stern antagonist, who begins with the very Preface of his opponent, and overturns *seriatim* every paragraph, down to the very end of the work. Perhaps there is no instance on record of a more formal logical contest than this. Chillingworth first gives entire the chapter in his adversary’s book, in numbered paragraphs, and then his own answer : as if determined that both bane and antidote should be thus eternised—that all future readers should be able to judge which was the victor in “this great argument !”

Let, then, the student who is in earnest about the discipline of his mind, procure this remarkable work,† and thoroughly exercise himself in it. He need not be long about it, if he will only set upon his task heartily ; but the consequences will be happy and permanent. As one of our judges, long deceased, said somewhat quaintly of Lord Coke—“The doses I took of Coke in early youth, operate even now ;” so may say, in after life, the pupil of Chillingworth.

* Poor Wilson, *alias* Knott, dismayed at hearing that Chillingworth was preparing to take the field against him, published a work beforehand, to prejudice the public against Chillingworth and his book, by charging him with *Socinianism* : and *after* Chillingworth’s work had been published, endeavoured to destroy its great popularity by writing another, to accuse him of *infidelity* ! One Francis Cheynell, a fanatical opponent of Chillingworth, attended at his funeral, and flung his famous book into the grave, wishing that it might “rot with the author.”

† The edition of Chillingworth’s Works, in three thin vols. 8vo. published by Priestley, in 1820, may be purchased for a mere trifle.

If the student do not choose to read the whole work—which even including the very copious citations from the book of its author's opponent, does not occupy more than two octavo volumes—let him select some particular chapter—the second, for instance—“*On the Means whereby the Revealed Truths of God are conveyed to our understanding, and which must determine controversies in faith and religion*”—perhaps the most elaborate and perfect of all. He must first read over the Jesuit's account of the *Rule of Faith*, and possess himself of the full scope and drift of its argument, before entering upon the answer of Chillingworth. Let him analyse it on paper, and keep it before him, to assist his memory. Proceed, then, to Chillingworth. Take, first, a bird's-eye view of the whole chapter (134 pages); and then apply yourself leisurely to the first half dozen pages. Pause after reading a few sentences; look off the book into your mind, and satisfy yourself that the *thought*, not the language, is *there*, fully and distinctly. Go thus through the work, carefully marking the stages of the argument, the connection of each thought with the other, and the general bearing of the whole. Set your author, as it were, at a little distance from you. Watch how warily he approaches his opponent—with what calm imperturbable precision and skill he parries and thrusts! Imagine yourself to be in the unhappy Jesuit's place: can you find an instant's opening? Is your opponent ever off his guard? Does he ever make a false thrust? Or fail of parrying the best of his antagonist?—Can you discover, in a word, a defect or a redundancy, either in thought or expression? Can you put your finger anywhere upon a fallacy? Try! Tax your ingenuity and acuteness to the uttermost!

Having thoroughly possessed yourself of the whole

argument, put away your book and memoranda, and try to go over it in your mind. Endeavour to repeat it aloud, as if in oral controversy; thus testing not only the clearness and accuracy of your perceptions, but the strength of your memory—the readiness and fitness of your language. Let not a film of indistinctness remain in your recollection, but clear it away, *instantly*, by reference—if necessary—to your book. Not content even with this, make a point, the next day, of writing down the substance of your yesterday's reading, in as compendious and *logical a form** as possible,—and go on thus, step by step, through the whole argument. Having so looked minutely at the means and the end—at the process and the result, at the whole and its parts—having completely mastered this celebrated argument in all its bearings, you will be conscious of having undergone unusual and severe exertion—of having received an invaluable lesson from one of the subtlest and most powerful disputants—one of the closest and most skilful REASONERS, whom perhaps the world ever saw. All the faculties of your mind—many of them, it may be, till then dormant and torpid, will have been drawn out into full play—will have been set, as it were, upon the *qui vive*. You will see at once both your weak and your strong points, and guide your future efforts accordingly. All this may look, *on paper*, tiresome, discouraging, unprofitable—possibly, to some even fantastic; it may seem so, at first, in practice. You may sit down somewhat sore and exhausted, perhaps, as from your first DRILL; but persevere! You will soon perceive the salutary effects

* The student may very advantageously consult the "Praxis on Logical Analysis," and the "Miscellaneous Examples for the Exercise of Learners," in the Appendix to Dr. Whately's Logic (pp. 334, *ad finem*).

and beneficial tendency of these intellectual gymnastics ! The soreness of your muscles will rapidly abate, as their activity and strength increase, not only sensibly but incredibly, with each succeeding lesson. You will thus have put yourself, as the pugilists have it, into thorough TRAINING ! Say that two hours a day, for several months—for a year—are thus spent, can the pains be for an instant set against the profit ? The toil may seem severe, and for a while thankless ; but it will be attended with permanently beneficial effects. Is it not worth a resolute trial ? Is it anything less than the acquisition of that intellectual power and skill on which alone you must rely for the rest of your life, in the acquisition not of distinction merely, but of a livelihood ? Young reader, we charge you not to shrink from the task—but to be resolute !—to search early, and see, what stuff your mind is made of. If you *break down* under the effort—if you be really unequal to it—if you cannot accustom yourself thus to close attention and patient thought, we beg of you to pause, before committing yourself to the legal profession. Do not, however, give up at the end of a week, fortnight, or even month ; persevere for *several* months ; as often as you fly off, come back again ; whenever you stumble, rise again and renew the struggle. Your breath may now and then fail you, your limbs may tremble under you, your heart may sink ; but *persevere* !—At the same time that this drilling is going on, form the resolution ‘*whatever* your (mind) findeth to do, to do with your might.’ Never on any pretence, on any occasion, suffer yourself to rest satisfied without a full and distinct understanding of what you are about. Never run away with a hasty half-formed impression—even of a paragraph in a newspaper. Remember

that it is the HABIT which you are concerned about forming. It is only in this way that you can ever get the complete control over your thoughts—that you can acquire tenacity and strength of understanding—that you can set your mind into real working trim.

“There is no talent, I apprehend,” says Dugald Stewart—and it is an observation worthy of being well considered—“so essential to a public speaker, as to be able to state clearly every different step of those trains of thought by which he himself was led to the conclusions he wishes to establish. Much may be here done by study and experience. Even in those cases in which the truth of a proposition seems to strike us instantaneously, although we may not be able, at first, to discover the media of proof, we seldom fail in the discovery, by perseverance. *Nothing contributes so much to form this talent as the study of metaphysics*—not the absurd metaphysics of the schools, but that study which has the operations of the mind for its object. By habituating us to reflect on the subjects of our consciousness, it enables us to retard, in a considerable degree, the current of thought; to arrest many of those ideas which would otherwise escape our notice; and to render the arguments which we employ for the conviction of others, an exact transcript of those trains of inquiry and reasoning which originally led us to form our opinions.”*

Chillingworth has been named, for the reasons above assigned, as eminently calculated to subserve the purposes of mental discipline, for the student. There are, however, some others who might be mentioned—particularly PALEY and BUTLER. The “*Horæ Paulinæ*” of the former is remarkably adapted for the profitable exercise of the minds

* El. Phil. ch. ii. p. 124-5 (6th ed.).

of law-students. It is pronounced by one of the highest authorities upon such matters, Dr. Whately, to be "an incomparable specimen of reasoning—" * and of that *kind* of reasoning, moreover, with which lawyers are peculiarly conversant, and in which they do, and ought to excel. The object of the *Horæ Paulinæ* is to prove the genuineness and authenticity of the thirteen letters of St. Paul, and the truth of the narrative contained in the Acts of the Apostles ; for which purpose, "the reader," says Dr. Paley, "is at liberty to suppose these writings to have been lately discovered in the library of the Escorial, and to have come to our hands destitute of any extrinsic or collateral evidence whatever ; and the argument which I am about to offer, is calculated to show, that a comparison of the different writings would, even under these circumstances, afford good reason to believe the persons and transactions to have been real, the letters authentic, and the narrative, in the main, to be true." Independently of the pre-eminent value and importance of such an undertaking, in a religious point of view, such an interesting and masterly exhibition of logical acuteness ought to be familiar to all capable of appreciating and profiting by it. A glance at the brief "Exposition of the Argument," at the commencement, will strongly impel the student to peruse and study the whole work. Let him consider how continually he must, if successful at the Bar, be engaged in a precisely similar manner, in dealing with witnesses, and documentary evidence, commenting upon, comparing, contrasting, combining the various statements, and detecting latent coincidences, or discrepancies ! How conducive must be such exercise to the formation

* Rhetoric, p. 94 (note), 5th ed.

of that watchful acuteness of understanding, from which fraud and falsehood cannot possibly escape !

Let the student, also, if so minded, try a fall (if one may be pardoned such an expression) with that giant thinker, Bishop Butler ; not deterred by the strong observation of a subtle and accomplished metaphysician, Sir James Mackintosh, that "*no thinker so great, was ever so bad a writer.*"* Doubtless, the Bishop exhibits few, if any, of the graces of style ; but rugged and inelegant as that style oftentimes is, it never conceals or impairs the closeness, strength, and profundity of *reasoning*, which characterise every paragraph of the "Analogy," and the "Fifteen Sermons at the Rolls ;" of which latter it has been truly remarked, that 'though styled Sermons, and really pronounced from the pulpit of the Rolls' Chapel, those discourses are rather the lectures of a great moral philosopher and metaphysician, than the ordinary instructions and exhortations of a divine.'

To descend, however, from these altitudes, let us proceed to observe, in an earnest practical humour, that one who is really anxious about the discipline of his thoughts, may render even his *amusements* subservient to this purpose. Chess, whist, and cribbage, are all excellently calculated to chain a wandering mind to its task,—to induce those habits of patient and vigilant attention, cautious circumspection, accurate calculation, and forecasting of consequences, which are essential to the successful study and practice of the law. It has frequently occurred to the

* Second Prelim. Dissert. &c. Sect. VI. Encyc. Britan. (p. 437). In this section will be found an exceedingly interesting and able account of the writings and philosophy of Bishop Butler. In Lord John Russell's *Memoirs of the Affairs of Europe*, he eulogises the "Fifteen Sermons" of Butler, as exhibiting "a rare union of theology and philosophy." (Vol. ii. pp. 491—2.)

author, that these little games would constitute, to many, the first and best possible steps towards mental discipline, especially if played with reference to such an object. They will be found efficient correctives of an erratic and volatile humour,—very pleasant and valuable auxiliaries. The student who resorts to them with this view, will, of course, take care to avoid their dissipating incidents and tendencies; prudently selecting those only for his antagonists, who are not only expert players, but “like-minded with himself.”

By means such as have been above suggested, deliberately adopted, and energetically persevered with, it is confidently predicted, that a student of only moderate intellectual pretensions may be enabled, in due time, to overcome the difficulties which beset legal studies, and to reap the fruits of his victory. His watchful and patient frame of mind will enable him to sit down calmly, and, with gradually increasing facility, unwind the most tangled skein which can be submitted to him. He will go on in his course, steadily and cheerily, amidst numbers of his competitors, who are either drooping under the unexpected fatigues they have encountered, or retiring with disgust, if not disgrace, from a campaign which ought never to have been undertaken. “Growing every day,” to adopt the language of Burke, “more formed to affairs, and better knit in his limbs,” he will be delighted and surprised at the rapidity with which what once were formidable obstacles begin to disappear from before him. Not only will he thus pleasantly proceed through the course of his studies, and be enabled, at an early period, to enter into practice with credit and advantage, but he will also be conscious of having gained a great accession of intellectual

vigour. His mind no longer flits and flutters about, butterfly-like, but settles upon every object with bee-like precision, industry, and success. The difficulties, intricacies, and obstacles, which dishearten and confound so many, are *his* congenial and bracing pursuits. His "amicable contests with difficulty," will, to adopt the beautiful expression of Burke, already quoted, "have strengthened his nerves, and sharpened his skill,—will have obliged him only to an intimate acquaintance with his objects, and compelled him to consider them in all their relations." A knotty "case," complicated "pleadings," a ponderous "brief," will be the welcome signal to be "up and doing," with all his practised energies and acquirements, securing at once profit and distinction to himself, and success to his clients.

"But," murmurs, possibly, an impetuous, or sneering, or desponding reader, "what a fuss all this about a trifle! Is there one man out of twenty of those who have *succeeded* at the Bar, who ever went through such 'training' and 'drilling' as you are urging?" Perhaps they did *not* adopt the particular means here suggested. They were men, possibly, of great natural abilities,—some of whom had received the advantages of consummate academical discipline, while others had expended a vast amount of misdirected and excessive labour. Look, however, hesitating student, not at those who have succeeded, but at the throng of those who have **FAILED!** Who have failed—and yet, perhaps, would have splendidly succeeded, had but some experienced friend stood beside them at starting, whispering such directions as we have here humbly endeavoured to offer, and so, by imposing a little timely and judicious discipline, have saved years

of misdirected and abortive toil—a thousand pangs of despair!

The author considers that he cannot better conclude this chapter than with the pointed and valuable observations of Dugald Stewart:—

“In what consists PRACTICAL OR EXPERIMENTAL SKILL, it is not easy to explain completely; but among other things, it obviously implies a talent for minute, and comprehensive, and rapid observation; a memory at once retentive and ready; in order to present to us accurately, and without reflection, our theoretical knowledge: a presence of mind, not to be disconcerted by unexpected occurrences; and in some cases, an uncommon degree of perfection in the external senses, and in the mechanical capacities of the body. All these elements of practical skill, it is obvious, are to be acquired only by habits of active exertion, and by a familiar acquaintance with real occurrences; for as all the practical principles of our nature, both intellectual and animal, have a reference to particulars, and not to generals, so it is in the active scenes of life alone, and amidst the details of business, that they can be cultivated and improved. The remarks which have been already made are sufficient to illustrate the impossibility of acquiring a talent for business, or for any of the practical arts of life, without *actual experience*.”*

. The student will find some valuable practical matter in Dr. Abercrombie's “*Inquiries concerning the Intellectual Powers*,”—especially in the Fifth Part of that work—“A View of the Qualities and Acquirements which constitute a well-regulated Mind.”

* Elements of the Philosophy of the Human Mind, chap. iv. § 7, pp. 228—230.

CHAPTER VII.

ON THE PRACTICAL STUDY OF THE CONSTITUTIONAL HISTORY OF ENGLAND.

It was intimated in the preceding chapter* that the study of English History by the young lawyer, was a topic of such great importance as to warrant a separate consideration of it. To this subject is the present chapter devoted—and the author proceeds to its discussion after only one preliminary observation: that perhaps no class of advisers upon this subject is more competent, or entitled, to speak with confidence, than that of lawyers themselves, who, though possibly of but moderate talents, have yet passed a considerable period of their lives in the study and practice (but not slavishly or exclusively) of the law, and are constantly witnessing indications, and effects, of the inseparable connexion between English History and English Law.

The following are the terms of Lord Bolingbroke's bitter reproach to the lawyers of his day:—"A lawyer † now [*circ.* 1736] is nothing more—I speak of ninety-nine in a hundred at least—to use Tully's words, *Nisi leguleius quidem cautus, et acutus præco actionum, cautior formularum, auceps syllabarum.*‡ But there have been lawyers who

* *Ante*, Chap. v. p. 164.

† *Study of History*, p. 353 (quarto edition).

‡ *De Orat.* 55.—*Pro Murena*, §. 11.

were orators, philosophers, historians ; there have been Bacons and Clarendons. There will be none such any more, till, in some better age, true ambition or the love of fame prevails over avarice, and till men find leisure and encouragement to prepare themselves for the exercise of their profession by climbing up to the '*vantage ground*, as my Lord Bacon calls it, instead of grovelling all their lives, below, in a mean but gainful application to all the little arts of chicane. Till this happens, the profession of the law will scarce deserve to be ranked among the learned professions ; and whenever it happens, one of the '*vantage grounds*, to which men must climb, is metaphysical, and the other historical knowledge : they must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discern the whole abstract reason of all laws ; and they must trace the laws of particular states, *especially of their own*, from the first rough sketches to more perfect draughts ; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced."

It is true that Bishop Warburton has attributed the above observations to mere spleen on the part of their noble and gifted author ;* but without entering upon so

* " I must laugh with you," says Bishop Warburton, in a letter to Hurd, " as I have done with our friend Balguy, for one circumstance. His Lordship (Lord Bolingbroke) has abused the lawyers as heartily as he has done the clergy—only with this difference : he is angry with us *for using* metaphysics, and with them for *not using* it. I know why. He has lost many a cause in a court of justice, because the lawyers would not interpret his *no facts* into *metaphysical* ones ; and been defeated in many an argument in conversation, because divines would not allow that true metaphysics ended in *naturalism*. I myself, who am but in my elements, a mere *ens rationis*, simply distilled, have dismounted him ere now."—*Warburton's Letters to Hurd*, let. xlii.

thankless an inquiry as the justice or injustice of the imputation upon the Bar of 1736, it is sufficient to suggest that every person entering into the legal profession—may advantageously ask himself these questions :—“ What do I **REALLY KNOW** of English History, especially in a *constitutional* point of view?—Have I any more than a general popular indistinct acquaintance with the course of the leading events detailed—for instance—in Hume? How long ago is it since I perused the *History* of that elegant and philosophical writer? And with what object? Merely for amusement—or as a quasi *task*?—Or did I go through it closely, as a preliminary stage of legal study?—Have I read, with anything like adequate attention or reflection, Hallam’s *Constitutional History*?—Were I now and here required—without reference to any books—to set down in writing my notions of some of even the more prominent events in history, with their remote or proximate causes or effects—*how should I acquit myself*?—Let me try. Suppose Mr. Hallam himself were to ask me some such question as any of the following :—‘ How did Charles I. really infringe the then existing constitution?—What were the true grounds on which proceeded the Revolution of 1688? What was the direct practical operation, upon the law and constitution, of the feudal system, in its rise, maturity, and decline? What is your notion of the difference between the mode and extent of exercise of the Royal authority by the Plantagenets, Tudors, Stuarts, and the present dynasty? In whose reign, since the Conquest, was made the nearest approach to despotic power—and how evidenced? And what is the nature of our present securities against such evils?—Give me your notion of Magna Charta: of Habeas Corpus: the Petition of Right: the

Bill of Rights : the Constitutions of Clarendon : the Exclusion Bill : * the Act of Settlement.—Let me see what is the actual extent of your acquaintance with these topics—or any of them—the times and circumstances connected with them !’—What sort of a notion, do you think, it is in your power—*inter nos*—to give Mr. Hallam of your acquaintance with these the more conspicuous matters of history ?’ Possibly a secret consciousness of deficiency, excited by these inquiries, may dispose not only some intending to enter, but others who have entered the profession—and whether they may be now students or practitioners—to consider with candour the suggestions about to be offered upon this important subject. A correct and extensive knowledge of English history is indeed not more necessary, than deeply interesting, to the lawyer, who either

* This topic is mentioned in consequence of a little occurrence which took place shortly before the original publication of this work. Several lawyers were conversing together on the subject which is discussed in the text—the topic having been started by one who doubted the necessity of any such chapter as the above ; on the ground that it implied a far less degree of knowledge on the subject than was possessed by four-fifths of those coming to the Bar. He who made this remark was from one of the Universities, and a man of undoubted talent, and considerable general acquirements. “ What, now, is *your* notion of the *Exclusion Bill* ! Tell us the when—why—and how of the matter !” suddenly but good-naturedly asked one of the party, who admitted that he had himself a ‘very—very slight knowledge’ on the subject. “ Oh—it was—something,” said the party challenged, after laughingly trying to parry the inquiry, “ connected with—the Revolution”—then occurred a little pause—“ it was to carry into effect the new—settlement of the succession, by—excluding the issue of James II.” —“ In whose reign was it passed !” continued the cunning querist. A long pause,—“ Why, of *course* early in William the Third’s—” In short, on being pressed, he actually knew not the king’s reign when the Bill was proposed : nor its exact object : nor the circumstances attending its introduction and discussion : nor its fate—(as to that, indeed, he boldly said it had passed into a statute !) No little mortification ensued on this discovery : but its salutary effect was, to set him who had exhibited this imperfect knowledge, upon *really* studying English history.

wishes early to discover, and long to retain, the reasons on which depend the rules of that law which he is earnestly learning or constantly practising ; or is capable of taking a philosophical view of the principles of jurisprudence and legislation, and applying them with practical wisdom to regulate the transactions of mankind. Would it were in our power to give one destined for the Bar, and but superficially acquainted with history, any idea of the painful conviction which he will have, after a year or two's intelligent study of the law, of the very great extent to which he might have facilitated and rendered attractive that study, by a previous due attention to constitutional history !—We say to such an one—be wise, and be wise in time ! And as for the actual practitioner—can he claim any title to the character of a worthy member of the English Bar, who is ignorant of the history of his country ? What reasonable chance has such an one of ever distinguishing himself in public life—of aspiring to political or legal eminence ? He is chained down to his daily drudgery like the galley-slave to his oar ; he cares about nothing but to get through his day's work ; is destitute of everything but a pitiful pettifogging familiarity with forms of practice, and can never get beyond that wretched apology of legal hacks and dunces—*ita lex scripta* ! Take him out of the beat of his books of precedents and practice, and a child may pose him. Expect not from *him* any explanation or vindication of the *reason* of the law, its general principles and policy. He comes day after day out of his chambers, or the court, like a blacksmith begrimed from his smithy after a hard day's work, content to have got through what he was engaged upon, neither knowing, however, nor caring to inquire into the

noble *uses* of the article which he has been forging. Thus the mere mechanical draftsman, your hum-drum pleader or conveyancer, may have got through the task assigned to him; may have drawn the instrument, and advised on the case submitted to him, with due dexterity; and that is the extent of his care or ambition! He is conversant, possibly, with the practical working of the provisions of feudalism—of the Statute of Entails, and against subinfeudations*—of the delicate and complicated machinery of Uses and Trusts, of Fines and Recoveries—but knows little or nothing of the interesting period of, and the stirring circumstances attending, their introduction—what led to their adoption—what reasons of state policy were concerned—whether they answered the desired end, and are fitted to the political exigencies of the present times.

With what profound and increasing interest must the intelligent practitioner contemplate the structure and working of the law, who has accustomed himself to the comparison of past, with actual and possible, exigencies and emergencies; observing the altered and altering circumstances in which society is placed with reference to particular laws—the vastly different purposes to which the lapse of time has appropriated them, from those to which they were originally dedicated. *He* is using, for most ordinary and peaceful purposes, the remnant of that machinery which was originally intended to aim a mortal blow at the aristocracy, at the clergy, at the liberties of the people, or at the prerogatives of the crown—calling forth at one time the tempestuous spirit of lay rebellion, at another, the counteracting subtlety of ecclesiastical machination: and which, having answered its great purposes, having,

* '*Quia Emptores*,' i. e. stat. 18 Edw. I. c. i.

in process of time, effected a silent revolution, at length discharges the sole, the comparatively humble but useful functions, of securing and transmitting property from individual to individual. The little instrument by which the modern conveyancer, for instance, secures 20*l.* a year to Mary Higgins and her children, is, in truth, the lever by which a king might have been prized from his throne ; which was applied, with consummate craft, to the destruction of the banded power of the aristocracy—or of the huge and gloomy fabric of ecclesiastical domination. Thus the water which might at first have been seen forming part of the magnificent confluence of Niagara, and then precipitated, amid clouds of mist and foam, down its tremendous Falls, after passing over great tracts of country, through innumerable channels and rivulets, serves, at length, quietly to turn the peasant's mill.

Apart, however, from this interesting and popular view of the subject, there is one much more practically important to be taken by the student : that without this contemporaneous pursuit of historical and legal knowledge, very considerable and important portions of the latter cannot possibly be appreciated and understood, and of course no pretensions whatever exist to the character of a *constitutional* lawyer. Can it be requisite to specify and insist upon the advantages—the necessity—of a sound and familiar knowledge of those extensive portions of our history which have originated the most important doctrines of our existing laws ? How many decisions and statutes are there, which would have been infinitely more easily understood, more thoroughly appreciated, more permanently retained, more readily applied to practical purposes, if accompanied and illustrated by an accurate knowledge

of the circumstances which gave rise to them ! Consider the assistance to be derived from the mere principle of *association* !—" Law then only becomes a rational study," says the celebrated Lord Kames, "when it is traced historically from its first rudiments, through its successive changes. With respect to the political institutions of Great Britain, how imperfect must the knowledge be of that man who confines his reading to the present times ? If he follow the same method in studying its laws, have we reason to hope that his knowledge of them will be more perfect ? A statute, or any regulation, *if we confine ourselves to the words*, is seldom so perspicuous, as to prevent errors, perhaps gross ones. In order to form a just notion of any statute, and to discern its spirit and intendment, we ought to be well informed how the law stood at the time, what defect was meant to be supplied, or what improvement made. These particulars require historical knowledge ; and, therefore, with respect to statute law, at least, such knowledge appears indispensable."*

" Institutions, which originated in the necessities of our ancestors," observes Mr. Ritso, following out the suggestion of Lord Kames, "must be necessarily traced back to the same ancient source for their construction. The only sure guide that can be had in the investigation of the theory of their principles, is the knowledge of the circumstances to which they were accommodated ; of the occasional or local demand for them ; of the original mischief to be provided against ; or the particular inconvenience which was intended to be prevented by them. . . . It demands the exercise of our riper judgment to

* Hist. Law Tracts, Pref. iii.

apprehend through what vicissitudes the prosperity of a state is made to depend upon the wisdom of its legislature ; to examine the boundary of those restrictions upon natural liberty which are necessary to be imposed for the common good ; to appreciate the causes of the improved condition of the people, in the progressive improvement of their municipal institutions and civil usages, and to trace the reverses which lead to anarchy and the dissolution of empire—to the dereliction of those fundamental maxims of *common equity* and *common right* which give to society the basis of its political constitution, and dispose it to lasting harmony. This inseparable affinity between the sources of historical and legal learning, may be said to constitute one of the brightest images in the theory of professional education ; for as, on the one hand, our history throws light upon our laws, so, in proportion to the erudition we acquire as lawyers, we equally ensure our proficiency as historians. They are *sister sciences*, which go hand in hand together, and mutually elucidate and assist each other. ‘Il faut éclaircir l’histoire par les lois,’ says Montesquieu—‘et les lois par l’histoire.’* It is not meant to be asserted that the generality of students are not—or may not be, or have been—at one time or another, acquainted and perhaps well acquainted—with the nature and consequences of this connexion between historical and legal knowledge ; but that, it is to be feared, they do not make sufficient efforts to *keep it up*, with a view to its practical application. The impressions produced by their more youthful readings are faint, indeed, and quickly effaced by other pursuits, especially by the absorbing cares of business. Perpetual procrastina-

* *Esp. des Lois*, l. xxi, c. 2.

tinations serve to render the matter at length hopeless. History gets to be looked at, alas ! not as an experienced guide and interpreter of things otherwise unintelligible, but as, at most, a pleasant occasional visitor ; it is resorted to, not as a matter of serious business, but mere recreation—a supernumerary accomplishment.* Hence the perilous position in which such a person is liable to be placed, when he finds himself suddenly—and perhaps publicly—called upon, either in court or parliament, to explain the *reasons* of the law, to vindicate his own statements when impugned, or assail and expose those of his adversaries. He has then no landmarks to guide him, no rallying points of historical recollection, and, in short, no precise and distinct ideas on the subject : wherefore he must either retreat in ridiculous confusion from his own hastily-assumed positions, or submit to misrepresentations, which, however he may suspect, he cannot *prove* to be such.† The common

* “History,” says Roger North, “particularly that of England, is to be accounted, however pleasant to read, an *appendix or incident necessary to the study of the law* : for it often lays open the reasons and occasions that have been for changes that have befallen the Common Law, either by authority of parliament, or of the judges in Westminster Hall.”—*Disc. Stu. Law*. p. 8.

† “An Irish barrister, referring to two great events, viz. the obtaining of Magna Charta and the Bill of Rights, confounded the sovereigns from whom they were exacted ; and a celebrated English barrister, having occasion to quote a statute, and being required to mention the period at which it passed, very gravely replied, that it was ‘in the reign of one of the Henrys, or one of the Edwards—but he could not exactly tell which !’”—*Will. Stu. and Pr. of the Law*, p. 31.—Not very long ago, a public speaker confidently declared the Petition of Right and the Bill of Rights to be one and the same thing—And what if it should be stated as a fact, that even a young member of the House of Commons spoke of the *Septennial Act* as passed in the reign of William and Mary ! And that a person in an important official situation, spoke of the writ of Habeas Corpus as “first introduced in the reign of Charles II. !”

maxim cessante ratione legis cessat ipsa lex, must, to such an one as we have been describing, be ever an alarming and hateful one !

“In an appeal to sober sense and to experience,” observes a judicious and learned writer, * “the advantages which arise, in this respect, to the advocate, from the study of history, will presently be found of great value ; they form a forcible contrast with the disadvantages which frequently result from an ignorance of that science. How often would it have proved a tedious and almost insupportable task to those whose office it is to hear and determine upon the arguments of counsel, had those who have filled the character of an advocate at the English Bar, been generally unversed in the events recorded in history : how confined would have been the legal notions of our courts ; how spiritless, and perhaps unjust, their interpretations of the law, had they who preside in those tribunals derived their principles of truth, in the administration of civil and criminal justice, from the letter of the law alone. On the other hand, what grand and striking displays of the reasoning powers—what extensiveness of remark—acumen of comparison—and power of combination, mark the argument of the advocate whose mind has been illumined by a contemplation of the hidden causes from which, as we have already remarked, laws in particular, amongst all other human subjects, derive their true character and complete force ! ”

Let the student but cast his eye over the pages of any of our professional biographies—the reports of any of our

* The author unfortunately has not the means of giving the name of the writer here quoted,—having accidentally omitted to insert it in the former edition ; and having since searched in vain for it.

state trials—and he cannot fail to note the frequent occasions on which our advocates have splendidly distinguished themselves by the accuracy, extent, and promptitude of their knowledge of constitutional history. To content ourselves with alluding to Lords Mansfield, Camden, Ashburton, Erskine, Eldon, Lyndhurst, Brougham, and one or two others of the present day who might be mentioned—can any one read their judgments and speeches, either in court or parliament, without appreciating the irresistible effect produced by their familiar, exact, and extensive acquaintance with the deep sources of our common law, and the occasions of our statute law? * How, indeed, is it possible for him to speak with the requisite air of *confidence*—to convince the obstinate, decide the doubting, enlighten the ignorant, and confound the crafty, who is not fully master of his materials—“strong in his points!” A sudden turn of the discussion, an unexpected question, a subtle suggestion, a daring assertion, will suffice to dislodge the pretender from his pedestal, and expose his shallow incompetence to derision! Innumerable occasions will arise, during the course both of the pupillage and practice of the ambitious lawyer, for regret on account of his ignorance, or satisfaction on account of his sound knowledge, of English history. The incessant allusions to its topics, in friendly conversation and discussion, either at chambers, in general society, in court, or even at the debating clubs, to which most young men attach themselves, will soon convince the student of the dangers of superficiality. The author would be, however, almost

* The Lord Keeper North “revered Lord Hale for his great learning in the history, law, and records of the English constitution.”—*Life of Lord Guildford*, p. 118.

ashamed to have said so much on the subject, but that he is aware, from long observation, how compatible is the readiest and fullest acknowledgment by students, of its importance, *with a practical neglect of it.*

A very large portion of Professor Smyth's Lectures on Modern History is devoted to that of England—which, commencing with the fifth lecture, is continued through twenty-two out of the thirty-six lectures of which the work consists. If the reader be already tolerably well acquainted with the leading events of English history, he is strongly recommended early to familiarise himself with Professor Smyth's lectures. They cannot, however, be advantageously read by one who has not *some* previous knowledge of the subject: and to any who may be destitute of it, the author recommends (merely, however, as in the nature of a chart, or outline map), the '*History of England*' of that indefatigable compiler, Mr. Keightley, in three moderate-sized 8vo volumes, published in 1839; and which gives, in a pleasing and popular style, the latest and best views of the history of our country, taken by deceased and present writers down to the present time. The author has perused and frequently referred to this work since its first appearance, and can bear testimony to its general accuracy and moderation, as well as the candour, independence, and caution, with which the statements of others are canvassed, controverted, or confirmed. The serious misrepresentations of Dr. Lingard are combated, on every occasion, boldly but temperately; and he is justly given credit for the great merits of his history of the Plantagenets;—while "he has treated that of the Stuarts," says Mr. Keightley, "more impartially than any other historian of the present

day." Mr. Keightley disclaims—and we believe him justified in so doing—the title of an ‘abridgment,’ or ‘compilation’ for his work. “In the early part,” says he, “I have derived my materials directly from the Saxon Chronicle, and the other original authorities. I have then taken Lingard as my chief guide (where his religion was not concerned), but with a constant reference to the authorities. From the accession of the house of Tudor, I have trusted only to contemporary writers, most of whom I have read, and all of whom I have frequently consulted. Instead of mere references, the very words of an authority are often placed in the text, by which practice space is saved, and the reader is enabled to judge for himself.”

A perusal of this work—or any other of a similar character recommended to the student by a competent adviser,—as a serious preliminary to a deliberate and systematic prosecution of the study of the constitutional history of England,—will qualify the student to become a pupil of Professor Smyth’s, by the diligent study of his “Lectures”—and of the leading authorities to which he refers, and which he most strenuously recommends for examination. The author by no means *pledges* himself for the soundness of all the Professor’s opinions or conclusions, though he has met with little from which any one of moderate views would be disposed to dissent; while there is no passage in our history, of any political importance, nor any great question arising out of it, which will not be found set before the reader in an eloquent and often admirable manner, accompanied by suggestions and reflections such as could have issued from no man who had not, as Professor Smyth has done,

devoted his whole life to the subject. As a specimen of his mode of dealing with delicate and difficult questions, the reader is referred to vol. ii. pp. 161—4, and 341, *et seq.*—where he discusses the question of the sovereign's right to appoint his own ministers. The second Lecture, "On the Law of the Barbarians," is one which the author considers to afford perhaps the fairest specimen of the powers of Professor Smyth.—His examination of the Salic Law is very interesting, and suggestive of many topics not likely otherwise to have occurred to the reader.—Whenever any important epoch is arrived at, (we are now alluding particularly to English history), the prevalent opinions of the time are given, and ably commented upon: and then are pointed out—with practical remarks on the character and value of each, and how far they deserve to be studied—the extant contemporaneous accounts of them, and those given by subsequent historians. Rapin, Ralph, Hume, Millar, Lingard, Sharon Turner, Sir James Mackintosh, and Mr. Hallam, all pass under the Professor's review, which cannot but be instructive to the reader.

Thus much for Professor Smyth. We shall proceed now to point out some matters which we believe will be found not unworthy of the notice of one who is in earnest, in wishing to become well versed in constitutional history. "To appreciate the *principles* of our law," says Mr. Starkie, "some reference to the *sources* of the law is indispensable: and it not unfrequently happens that the student's researches afford remarkable and interesting explanations of customs, or traditional expressions, where he least expected to find them."*

* Lectures at the Inner Temple. Leg. Examiner.

I. The **ANGLO-SAXON PERIOD** of our history has of late years been the subject of a close and constant investigation, by men peculiarly qualified for the task, which it had never received before. To Mr. Sharon Turner (who is a member of our profession, and one of its brightest ornaments) is due the credit of having first [1799] called attention to this most important and interesting, but obscure, portion of our history. His "History of the Anglo-Saxons" (constituting the first three volumes of his History of England in twelve volumes, published in 1839) may be had separately—and its perusal will be found at once easy, interesting, and instructive. Mr. Turner has invested what had long appeared the most barren and inaccessible portion of British history, with the verdant charm of comparative novelty. Whoever brings to the perusal of the work in question a pretty sound general knowledge of English history in its subsequent stages, will peruse Mr. Turner's work with the liveliest interest; and, if a thoughtful lawyer, find it suggestive of the most instructive reflection and speculation.—It is in these remote and dusky regions of English history, that are to be discovered the foundations of our glorious Constitution: and indifference or ignorance with reference to this subject, constitutes an indelible reproach to any one ambitious of the title of a political student. Here, however, let us direct attention to another topic of the utmost importance—one which we are surprised to find not even alluded to by Professor Smyth: we mean, whether the **ROMAN LAW** does not enter largely, as one of its earliest elements, into the composition of our system of government; and whether this cannot now be traced satisfactorily, if not even indisputably?

It is to the profound researches of Savigny that we were originally indebted for this interesting and most important addition to the true history of our institutions. In his "History of the Roman Law during the middle ages, showing the influence of Roman jurisprudence on the Law of the nations of Western Europe generally during the six centuries before Irnerius"—he has, in the language of one of his most learned contemporaries in England (Sir F. Palgrave), demonstrated the continuance of Roman policy, and a Roman people, far into the middle ages. "After having long investigated the subject," says Sir Francis, "I may be allowed to add my opinion, that there is no possible mode of exhibiting the States of Western Christendom in their true aspect, unless we consider them as arising out of the dominion of the Cæsars." As the great work of Savigny may be inaccessible to many English students, (the only translation of it, by Mr. Cathcart, sanctioned by Savigny himself, having unfortunately proceeded no further, since 1829, than to the end of the first volume, which is now very difficult to be procured), the author here presents the student with a condensed summary of the learned translator's account of one of the chief results of Savigny's researches.

"The extraordinary resemblance which our own municipal institutions bear to the Roman, even in the circumstance of their peculiarly aristocratic character, must be at once apparent; and, it would be a subject of the most interesting historical research, to collect and arrange the scattered probabilities in favour of their Roman origin. The long-abiding sovereignty of imperial Rome over the ancient Britons—the consequent civilisation flowing from

that influence—the establishment of Roman civic communities and Roman law—the permanency of these corporations in the other provinces of the western empire—the early traditions regarding the origin of many of the present cities,—the statements in ancient records concerning the prevalence of the *Lex Romana*,—passages in the *Leges Burgorum*, &c., &c.—and the study of the Roman law in York, A.C. 804, might all serve as guides through the labyrinth, or as gleams of light across a path of admitted difficulty and danger. On the other hand, the peculiar character of the Saxon and Caledonian invasions, and the darkness enshrouding the early periods of British history, damp the hopes which the former circumstances had just awakened, and chill the inquirer's energies almost at the moment of their birth. Unquestionably, however, Whitaker has shown that the current accounts of the Saxon conquest are in many respects erroneous ; although, without doubt, the victors subverted the laws and institutions of the provincials, whenever they interfered with the customs and policy of the former. Indeed, if the numerous armies which overran France and Italy, left so many old Roman institutions and rights of property unimpaired, there is something apparently incredible, in asserting that they were utterly annihilated, in Britain, by a comparative handful of invaders—too few even to overawe a people long accustomed to submission. Among the Saxons, we find all the general features of the Germanic policy ; and no other branch of the same race ever waged that exterminating war against Roman institutions and provincial Romans, which the successive followers of Hengist and Horsa are alleged to have unceasingly and indiscriminately done. The full estab-

lishment of the Roman civic system existing in Britain, at the date of the Saxon invasion, is a matter of which none can doubt. Britain contained 140 cities towards the close of the first century of the Christian era. * * *

“The withdrawal of the Romans may have broken down the frame of government which immediately depended upon the Roman officers, but could scarcely of itself unhinge any of the parts of that municipal system by which many of the cities had, during centuries, been trained and taught, and accustomed to govern themselves. * * *

“The earliest Anglo-Saxon laws contain so few ordinances regarding the private rights of individuals in civil business, that other regulations must have existed in the cities, and wherever commercial intercourse had awakened or kept alive the faintest sparks of civilisation. * * *

“Since the invaders neither new-peopled their conquests, nor destroyed all the Roman cities, the old civic system must have been allowed to continue; for the Saxons had no municipal policy of their own, by which it could be superseded, and had long a violent antipathy to residence in cities. The instantaneous abrogation of the whole Roman system, and the introduction of the rural Hundred policy into the cities, implies, either that the cities were immediately peopled by Saxons, or that the old inhabitants were at once raised to the rank of Saxons, and admitted to a full participation in all the rights and privileges of the conquerors. * * *

* * * “Numerous other points of resemblance will occur to all who have paid the least attention to the subject; and many of Savigny’s readers will, it is hoped, feel an inclination to follow out the subject for themselves.

While the authority of the Saxon codes prevailed over the greatest part of the country, and may have been paramount, numerous doctrines of the Roman law appear to have existed in several cities of Britain, during the early part of the middle ages, along with portions of the old Roman civic system.”*

These views have been adopted and carried out by Mr. Allen, a writer of very great learning and acuteness, in his admirable “Inquiry into the Rise and Progress of the Royal Prerogative in England.” This is a small octavo volume, published in 1830, extending to only about two hundred pages, including the copious “Authorities and Illustrations;” but never has the author seen the important results of extensive and profound investigation conveyed in a style of such purity, terseness, and simplicity, as characterise this masterly performance. It throws a flood of light over some of the most obscure and perplexing portions of our early history and existing institutions.† The leading object of Mr. Allen is to show the monarchical theory of modern Europe to have been derived, not from the ancient Germans, but from imperial Rome : ‡ when emperors contrived to vest in themselves the *whole power of the state*, of which they were the august representatives, with commensurate authority and power. Hence, according to Mr. Allen, the division between the natural

* Savigny's History of the Roman Law during the Middle Ages. Vol. i. Editor's Note to the Author's Preface. Pp. lii—lxiv.

† It is singular that such a valuable work has been so long out of print. The author has never hitherto been able to purchase a copy, and has for some years had to rely upon that in the Inner Temple library, and another borrowed from a friend—a very learned and eminent historical and antiquarian writer (Sir H. Nicolas).

‡ See 1 Blackst. Comm., p. 250, and Allen on the Prerog., *Authorities and Illustrations*, p. 13.

and political 'body' or 'capacity'—the 'mystical union of the *ideal* with the real king.'* Nothing but an attentive perusal of the work in question can give the reader an adequate idea of the value of this suggestion, in explaining some of the most striking anomalies in our theoretical Constitution.

Sir Francis Palgrave, as already intimated, adopts these opinions to their fullest extent ; and has, in his "Rise and Progress of the English Commonwealth, during the Anglo-Saxon period," made them the subject of most elaborate examination, and extensive illustration. It is the great object of this, and the other work of Sir Francis Palgrave, already quoted, to establish the connexion between the states of modern Christendom, and the Fourth Great Monarchy, the Roman empire. "By some of our popular historians," he observes,† "Robertson, for instance, this fact has either been forgotten, or denied : nor does the relative position of ancient and modern Europe appear to have been clearly understood even by Gibbon—though the main views had been established with singular acuteness by Dubos, in his '*Histoire Critique de l'Etablissement de la Monarchie Française dans les Gaules*'—one of the most valuable historical essays in the whole compass of literature." In his larger work,‡ he asserts broadly, that, "the whole system of the military and other tenures of the Teutonic nations, from the period when they became known to us as the States of the Middle Ages, must be considered as the result of the intermixture of their own laws and institutions with the

* Allen, *Prerog.*, pp. 27, 29.

† *Hist. of England, Anglo-Saxon Period*, vol. i. Pref. p. 9.

‡ *Rise and Progress of the English Common.*, p. 77.

jurisprudence of Rome : and the first chapters of the history of Feudality, must be sought in the decrees of the Senate, and the rescripts of the Cæsars." This is a subject every way worthy of the attention of a student anxious to trace his country's institutions to their true origin : and the little treatise of Mr. Allen, and the "History of the Anglo-Saxon Period," (a small duodecimo of 390 pages, published in 1831, as a volume of Mr. Murray's Family Library) by Sir Francis Palgrave, will suffice to put him fully into possession of the merits of the question. Whether our early constitution consisted exclusively of Barbarian—of Saxon and Norman—customs and institutions,—or of those, together with the principles of the Roman jurisprudence, may be a question of as much difficulty and doubt, as interest and importance : but a single perusal of Mr. Allen's masterly treatise will satisfy the student that there exists for the proposition there contended for, something very far beyond "the beau idéal of an antiquary's imagination, the casual discovery of a few coins, and the existence of an occasional tumulus."* It may be added, as a singular and interesting circumstance, that Sir Francis Palgrave appears to have arrived at the same important conclusions as those which had been arrived at by Savigny and Mr. Allen, before having been aware of the existence of their researches. "When I convinced myself," says Sir F. Palgrave, "that the states composing Western Christendom were to be considered as carrying on the succession of the imperial authority of Rome, I had not the advantage of being guided by either of these

* Stephens' (A. J.) Introduction to De Lolme on the English Constitution, page 6.

writers. * * * Our investigations were pursued independently of each other.”*

Mr. Starkie has added the weight of his authority to the opinion that the Roman law is incorporated to a very considerable extent with the original elements of our constitution. “After the conquest of a great part of Britain by the Romans,” says he, in his introductory Lecture delivered at the Inner Temple in 1834,† “and during a dominion of four centuries, privileges were confirmed, and *laws* and *customs* were established, which no doubt survived the Roman *authority* in this kingdom. For although the Anglo-Saxon laws have but few references to those of Rome, it is very dangerous to infer the non-existence of particular institutions from the silence of written laws concerning them; and the circumstance of the earliest Anglo-Saxon laws containing so few ordinances as they do regarding the private rights of individuals in civil affairs, leaves room to suppose that these were governed by existing regulations, as to which the written laws are silent.

“It is, however, beyond all doubt, that long after the Romans left this country, and so late even as the year 800, a school for the study of Roman law, existed at York, the seat where, according to historical tradition, Papinian himself had filled the judgment seat.”

II. THE FEUDAL SYSTEM—‘is so interwoven,’ says Lord Mansfield, ‘with almost every constitution in Europe, that it is impossible, without some knowledge of it, to understand modern history.’ This, however, the merest tyro must be aware of, and may have never-

* Rise and Progress of the Eng. Comm., Pref. pp. 6, 7.

† *Vide ante*, p. 13.

theless neglected practically to avail himself of such knowledge. How superficial and grovelling, in such a case, must be the character of his mind—which can have passed years in ignorance of the true nature of that wonderful system—"that prodigious fabric," to adopt the striking language of Hume, "which for several centuries preserved such a mixture of liberty and oppression, of order and anarchy, of stability and revolution, as has never been experienced in any other age, or in any other part of the world."* It lasted for about a thousand years. Faint indications of it appear A.D. 500; it was in its greatest vigour about A.D. 1000, and was not extinguished till about A.D. 1500, in the principal countries of Europe. It continues, however, in operation to the present day in Russia. "The Feudal System," it has been well observed, "was not erected by any one sovereign, nor did any one sovereign overthrow it. It was the growth of ages, and the result of numberless events, each of which contributed its peculiar share in the production of the joint effects. It developed itself in countries where the monarchs were powerful, and in others where they were almost powerless: it was born in the anarchy consequent on the overthrow, by rude barbarians, of an ill-ordered empire, and became by degrees a part and parcel of the characteristics of every nation of Europe. It battled at one time with kings, at another with ecclesiastics, at another with the people, and was at length, by imperceptible degrees, subverted by the combined power of all; leaving behind it, however, effects which remain even to the present day."† Without a thorough know-

* Hist. of England, vol. ii. pp. 89 *et seq.* (2d Appendix.)

† Lord and Vassal, Intro. p. v.

ledge of the principles and details of this system, a man will be but a confused and shallow historian; while, as for *law*—the chief branch of it, that of real property—he can know nothing whatever of it worthy of being called knowledge—nay, he cannot stir a step, without stumbling in the dark:—the simplest conveyance will puzzle him, the minutest departure from precedent bewilder him. He cannot comprehend a tithe of the reason and principles of real property law, as administered previously to the recent alterations; nor appreciate the scope, the character, and value, of those alterations themselves. *With* this previous knowledge, he may depend upon his acquisition and *retention* of many of the most abstruse doctrines of the law being greatly facilitated, and also rendered highly interesting.

I. The most recent publication (1844) on the Feudal System, is, an anonymous one (published by Parker, West Strand), of an elementary and popular character—entitled—“The LORD and the VASSAL; a Familiar Exposition of the Feudal System, with its Causes and Consequences.” It is a slight duodecimo volume, but closely printed, containing 140 pages, and costing two shillings. It is based upon Robertson, Hallam, and Guizot,* with illustrations from other writers—and takes a comprehensive and generally correct view of the subject. One serious error, however, appears chargeable to the writer; viz. the implicit adoption (pp. 94 *et seq.*) of the exploded notion that the Roman Law had perished with the Western Empire, and revived in the twelfth century,

* In the Fourth Lecture of M. Guizot's History of Civilisation in Europe, will be found a very philosophical estimate of the influences of the feudal system.

after six hundred years of neglect and oblivion, in consequence of the accidental discovery of a copy of the Pandects at Amalfi.—If the author was aware of the modern learning on this subject, especially of the researches of Savigny*—he certainly ought to have apprised his readers of them, as at least of a very important moot point, instead of treating the alleged discovery at Amalfi as an admitted and unquestioned historical fact, together with all the important consequences flowing from it.—II. LORD BROUGHAM, also, in the eighth and ninth Chapters of the First Part of his Political Philosophy, gives a popular and luminous account of the Feudal System; with an examination of all the more important views of recent writers—especially those of Mr. Hallam and M. Guizot. III. Mr. HALLAM has a very elaborate and able exposition of the Feudal System, especially in France, in his “Middle Ages”—vol. i., pp. 142—323. (ch. ii., parts 1, 2.) IV. Mr. HUME’s brief but beautiful sketch of the Feudal System, in the Second Appendix to his History, Vol. II., p. 89, [ed. of 1826,] is universally known. Any one of these will suffice to give the student a correct *general* view of this remarkable system; and will prepare him to read, and understand, either of the two following accounts of the Feudal System in its direct LEGAL bearings. (I.) Sir Martin Wright’s “Introduction to the Law of Tenures”—*i. e.* the Origin, Progress, and Doctrine of Feuds, and the existing Tenures which originated from them. This is a small octavo volume of 220 pages only,

* See *ante*, pp. 246, *et seq.* In the author’s forthcoming edition of Blackstone’s Commentaries will be found, carefully collected, the leading opinions upon this subject, in correction of the statement made by Blackstone in vol. i. pp. 17, 18.

and contains three chapters. Every word of this work should be read and re-read with the utmost attention. The same may be said of (II.) the very masterly account of the Feudal System given by the late Mr. Butler, exhibiting the contrast between some of its leading provisions and those of the Roman Law; * the branches of the feudal jurisprudence relating to the *inheritance* and *alienation* of the feud: the various modes and artifices adopted in various countries to elude or overthrow the restraints upon alienation: the general history of its DECLINE, through the introduction of the practice of *subinfeudation*; of tenure of *escuage*; of *uses* and *trusts*. This invaluable note, in continuation of Mr. Hargrave's brief note at 64 (a), constitutes the first of Mr. Butler's to Co. Litt. 191 (a), occupying thirty-one pages. The student should follow it up with the equally able and important Notes on *Uses*, Co. Litt. 271 (b), and *Trusts*, 290 (a). It is still a moot point whether Feudal Tenures were known in England before the Conquest. The middle and better opinion is that of Coke, Hale, and Blackstone, viz., that there are traces of feuds in the Saxon polity; but that we owe their introduction—as a complete system—to William the Conqueror.† The mailed hand with which that great warrior grasped and shook our institutions, has, so to speak, left its deep impress upon them to the pre-

* See also Stuart's View of Society in Europe, and Dr. Robertson's—(prefixed to his History of Charles V.)—Dalrymple on Feuds '(an excellent treatise); the "full and masterly" [Co. Litt. 191 (a)—Mr. Butler's note] introductory chapters to the second volume of Blackstone's Commentaries; and the third, to the eighth, inclusive, of Sullivan's Lectures.

† See Keightley's Hist. of England, vol. i., pp. 82, 128; Mr. Butler's note (Co. Litt. 191 a); Wright's Tenures, chap. ii. (where the subject is fully discussed); Mr. Hallam's Middle Ages, vol. ii., pp. 408 *et seq.*; and in 3 Kent's Comm., p. 501 (note a).

sent day; and in spite of the persevering, and recently powerful efforts of the legislature, it is impossible, perhaps, to predict its ever being completely obliterated. In the progress of time, however, it has been greatly modified, by its continual conflict with the spirit of *commercialism*, which has gradually overcome many of the rigid and apparently inflexible principles of feudalism. "Feudalism and Commerce," justly observes a recent writer already quoted, "are imbued with a totally different spirit. Commerce is diffusive, feudalism exclusive: commerce tends to lessen distinctions of rank in society; feudalism strengthens them. Commerce tends to make the earth one great nation: feudalism breaks it up into an indefinite number of petty nations. Commerce seeks to discover new countries, new seas, new channels of communication: feudalism knows little, and cares little for what occurs beyond its own limited circle. The rise of the Italian cities, such as Venice, Genoa, Pisa, and Florence, took place in direct opposition to the wishes and plans of the Feudal Barons."* How striking will be the illustration of the foregoing remarks, afforded to the *scientific* law-student! "The occasion of the difficulty," observes Mr. Ritso, in the course of his learned 'Introduction,' from which we have already made several quotations, "if any, which occurs in the foregoing propositions, arises from a want of due knowledge, in ourselves, of the extent to which the principles of the feudal polity have been engrafted into our established system of remedial jurisprudence, and the consequent distinction which the common law has taken between *feudal* and *commercial*, with respect to the descent or alienation of

* Lord and Vassal, pp. 137, 8.

real or landed property. From the period of the establishment of the feudal polity in England, in the reign of William the Norman, there seems to have been kept up a sort of constant struggle between the spirit of commercialism on the one hand, and that of feudality on the other; and the consequent operation of these two grand principles is to be traced in every part of our law of landed property. The construction of testamentary alienation, for instance, was originally adopted upon a purely commercial principle, and in relaxation of the rigour of the feudal system, which had a direct tendency to take lands out of commerce, and to render them inalienable."*

III. THE REVOLUTION OF 1688, is an epoch in our history very familiar, *by name*, to almost everybody: not so the true grounds on which it proceeded—the grand principles involved in that remarkable and glorious event. "On such a subject as the Revolution of 1688," says Professor Smyth,† "the student will surely think that no pains he can bestow are too great. But he will rise from the whole with very different impressions from those with which I did, if he do not entitle this Revolution, not only the *glorious*, but in the first place, the *fortunate* Revolution of 1688. If he can but place himself in the midst of these occurrences, and suppose himself ignorant of what is to happen, it is with a sort of actual fear and trembling that he will read

* "Introduction to the Science of the Law, showing the Advantages of a Legal Education, grounded on the Learning of Lord Coke's Commentary upon Littleton's Tenures, with a view either to the Bar, the Senate, or the Duties of Magistracy," by F. Ritso. 8vo. 1815. This is a small work now difficult to be procured, but full of sound and valuable disquisition. Whenever the book can be met with, it should be purchased by the student.

† Lectures, vol. ii. pp. 50, 51.

the history of these times. Let him consider what his country has become, by the successful termination of these transactions, and what it might have been rendered by a contrary issue: how much the interests of Europe were, at this juncture, identified with those of England—and what a variety of events, the most slight and the most natural, might have thrown the whole into a state of confusion and defeat!" Who sees not here—let us reverently inquire—the hand of an All-wise, Overruling Providence?—The student is referred to the excellent account of this great event; of the persons,—their characters, motives, and conduct—concerned in it; and the contemporaneous and subsequent narratives of, and disquisitions upon it; given by Professor Smyth, in Lectures XX., XXII., XXIII. The speculatively delicate and difficult doctrine concerning the Right of RESISTANCE—will be found discussed by Lord Brougham, in his "Political Philosophy," Part I., ch. 1, (Vol. I., pp. 45, 51, *et seq.*), and Part III., chs. 28 and 29 (Vol. III., p. 293, *et seq.*). In this latter place, he asserts broadly that "the structure of the Government was made, at the Revolution of 1688, to rest upon the People's Right of Resistance, as upon its corner-stone;" and in the former, he comments at length upon the opinions delivered by Paley, Blackstone and others. M. Guizot, in his "Progress of Civilisation in Europe" (Lectures XIII. and XIV.) gives an admirable account of the English Revolution, and a calm and philosophical comparison of it with that of France. In another work, which will be next noticed, he has the following striking observation upon this subject:—"While through the exterior resemblance of the two Revolutions, a great dissimilitude is perceptible: so, beneath their

dissimilitude, a still more profound resemblance is hidden.” —The work from the “Author’s Preface” to which this passage is quoted, is M. Guizot’s “History of the English Revolution, from the accession of Charles I.” published in English, by Talboys, at Oxford, in 1838.—It has as yet, we believe, not gone farther than to the death of Charles I., and the Abolition of the Monarchy—but was designed to proceed to the fall of James II.; and Mr. Hallam thus characterises the portion already published:—“The extensive knowledge of M. Guizot, and his remarkable impartiality, have been already displayed in his collection of Memoirs illustrating that part of English History; and I am much disposed to believe that if the rest of his undertaking shall be completed in as satisfactory a manner [as the part above mentioned], he will be entitled to the preference above any one, perhaps, of our native writers, as a guide through the great period of the seventeenth century.”* Sir James Mackintosh commenced an elaborate work on the Revolution of 1688, but did not live to proceed further with it than to the end of the eleventh chapter, *i. e.*, “down to the eve of that collision between James and the Prince of Orange—developing the *causes*, remote and proximate, of the approaching Revolution.” —It has since been completed, at considerable length, anonymously, and constitutes a large quarto volume.—There is one other work, however,—a perfect *mine* of constitutional learning—which the student will be very fortunate if he can succeed in obtaining. The author was, some years ago, indebted for being made acquainted with it, to the strenuous eulogiums of an eminent person intimately acquainted with every branch of antiquarian and

* Constitut. History, vol. i. Pref. viii.

constitutional history. The work in question is entitled "BIBLIOTHECA POLITICA; or, an Enquiry into the "Ancient Constitution of the English Government, with "respect to the just extent of the Regal Power, and "the Rights and Liberties of the Subject; wherein all the "Arguments, both for and against the late Revolution, "are impartially represented, and condensed: in Four- "teen Dialogues," by *James Tyrrell, Esq.** This is the author of the "General History of England,"—but which was completed only to the reign of Richard II., in 5 vols. folio, 1700—1704. The "*Bibliotheca Politica*" was published by him some few years after the establishment of William and Mary, viz., from A.D. 1692 to A.D. 1695. Several years' frequent reference to this work, chiefly with reference to his edition of Blackstone's Commentaries, has satisfied the author that in no other single work extant—(which, at all events, the author has been able to discover) is to be found so vast a store of constitutional learning, on at once the most difficult, interesting, and momentous topics which can be discussed by Englishmen. Several of our chief writers are deeply indebted to this work, without having acknowledged their obligations to its writer.—He was a friend of the Revolution, of which he speaks as "a wonderful and happy one;" but his whole work is characterised by signal moderation and impartiality. It is in folio, (the second edition published in 1727,) and contains 740 closely printed pages. It is very scarce; and it was with difficulty that the author

* This learned man was a member of Queen's College, Oxford, and of the Inner Temple. He was called to the Bar, A. D. 1666, but never practised; living studiously on his private estate in Buckinghamshire. He was struck out of the Commission of the Peace by James II., for refusing to aid him in his measures in favour of Popery.

at length procured a copy ; for which he was indebted to the great kindness of Mr. Payne, the eminent publisher in Pall-Mall, who presented it to the author as "the only copy to be found in London, after much inquiry." Sir Harris Nicolas mentioned it to the author as incomparably the most learned work with which he was acquainted upon the subject.—This, then, is a work which the student should not fail to procure, whenever he meets with it, nor to consult when it is found in public libraries.

IV. THE FINANCIAL HISTORY OF ENGLAND—the Origin and Progress of its REVENUE—unpromising as the subject would at first sight appear, discloses a vast deal of the real practical working of the Constitution—from the very earliest period of our national existence ; and furnishes to the attentive student, an interesting and fruitful field for inquiry and reflection, and numerous illustrations of some of the most important doctrines of constitutional law. *Money is the root of all evil* : and the History of England teems with dark and bloody details of trouble, and oppression, arising out of the tyrannical exaction of money from the people. How would the student appreciate our present happy and effectual safeguards against such cruelty and imposture, who was familiar with the barbarous doings of many of our early monarchs ! With what profound interest would he regard the provisions which long and terrible experience has dictated to those who have from time to time devised those measures for the effectual protection of the people against the recurrence of similar outrage and oppression ! There cannot be a more striking illustration of the progress of the British Constitution—its plastic adaptation to the altering opinions and exigencies of society—than is

afforded by a correct account of the mode in which the regal revenue has been provided for. Compare the periods of the Norman, Plantagenet, Tudor, and Stuart dynasties, with those subsequent to the Revolution of 1688!—Till the author had become tolerably familiar with this subject, some years ago, through the medium of a work which he is about to recommend to the student, the author was not aware how exceedingly interesting, as well as important, was the History of the Revenue of the Country. He alludes to Sir John Sinclair's "History of the Public Revenue of the British Empire;" in three volumes octavo. "We have had," says he, "many Naval, Military, Commercial, Ecclesiastical, and Parliamentary Histories: yet *this*, it may be said, is the first attempt at a FINANCIAL HISTORY." It would exceed the limits assigned to the present chapter, to illustrate (as the author had intended) the utility and interest of this elaborate and learned work. A single glance at the introductory chapters will satisfy the most sceptical.—The work was written and published between the years 1786—1804; and the edition used by the author is the *third*, which appeared in the latter year. It may be had for a very moderate sum. Adam Smith's "Wealth of Nations" will also be found to throw strong light upon this department of history, and should be frequently referred to. A large amount of interesting and valuable modern information upon this subject is to be found in Mr. Porter's "Progress of the Nation, in its various Social and Economical Relations, from the Beginning of the Nineteenth Century to the Present Time"—a work in three small duodecimo volumes, the last of which appeared in 1843. Mr. Porter is a man of extensive experience

and familiarity with matters of finance and political economy: and his official situation gives him first-rate opportunities for acquiring authentic information on all the subjects treated of in his work. He is a strong opponent of the financial system of Mr. Pitt, and is also a pretty determined Whig; but the information which he has collected together is to be depended upon for its accuracy, and its arrangement is admirable. The author has frequently consulted it, since its first appearance, and can bear testimony to its general excellence. Till its appearance, he had always felt greatly at a loss for the information which it contains.

V. THE LORDS' REPORT ON THE DIGNITY OF A PEER,—drawn up by the late Lord Redesdale, and published in 1823—1829, by order of the House of Lords, contains a vast mass of important matter upon some of the most interesting and difficult questions in Constitutional Law. The first volume traces 'the *Constitution of the Legislative Assemblies* of England from the Conquest, 'through a long course of years—so far as the documents 'accessible to the Committee appeared to them to furnish 'means for the purpose—down to the Unions of England 'and Scotland, and of Great Britain and Ireland.' Including the Notes, this volume contains nearly 500 closely printed pages of minute and elaborate research and disquisition, based upon constant reference to original, authentic, and official sources of information: and at page 389 (Division XIII.), will be found a 'Recapitulation,' of the entire subject of inquiry, a glance at which will satisfy any one of the great value and importance of the labours of the Committee. The student must not on the one hand be checked from perusing, or consulting,

this work by the indifferent style of its composition, and its somewhat defective arrangement; nor, on the other, place *implicit* reliance upon all its statements. There may possibly be visible in it traces of a pretty decisive *bias*; and the arduous and inevitable difficulties of the undertaking, render pardonable even more serious errors than have been charged against it. An abridgment of this Report, by one competent for the task, would be a very important and valuable addition to this department of learning, and be doubtless very well received. This suggestion the author heard very recently made by a person of great eminence. The same department of constitutional learning was thoroughly explored and ransacked during the protracted discussions in Parliament, upon the Reform Bill. The student should refer to Hansard for the speeches of the leading advocates and opponents of that measure, in both Houses of Parliament.—SIR EDWARD COKE'S FOURTH INSTITUTE, "Concerning the Jurisdiction of Courts," is worthy of frequent reference and attentive study. It is characterised by profound learning: but it has been said not to be free from great errors.*—This, and the Second and Third Institutes, were not published till after Sir Edward Coke's death, under an order of the House of Commons, (12th May, 1641). Before quitting this topic, we may also mention the very learned "Prefaces," as they are called, (but which are in fact elaborate preliminary Treatises,) prefixed to the "Proceedings and Orders of the Privy Council," edited and published by Sir Harris Nicolas, under the sanction, and by the direction, of the Record Commissioners. The author has read all of them

* Kelyng's Reports (temp. Carol. II.), 21. Bridgman's Legal Bibliog. page 74.

with close attention; and found in them important corrections of long-established errors. A similar observation may be made with reference to the elaborate "Introduction," prefixed to the first volume of the "Statutes of the Realm"—from A.D. 1101 (the first year of Henry I.) down to A.D. 1713 (13th of Anne), also published by order and under the superintendence of the Record Commissioners.

REEVES' "HISTORY OF THE ENGLISH LAW, from the time of the Saxons to the end of the reign of Elizabeth," in five small volumes, affords a clear and accurate view of the rise and progress of the laws of England. Into this work is incorporated, by its very learned author, 'the whole of GLANVILLE, and what seemed to be the most interesting part of Bracton.'* It will require some little time and attention to become reconciled to the dry detail by which this important work is characterised—but it *must* be done by one who aspires to a superior knowledge of the foundations of our system of jurisprudence. Mr. Hallam speaks of this work in terms of high commendation—as "one, especially in the latter volumes, of great research and judgment: a continuation of which, in the same spirit, would be a valuable accession, not only to the lawyer's but philosopher's library."†

"SULLIVAN'S LECTURES‡ on the Constitution and Laws

* Vol. i. Pref. ix. "I believe little is to be acquired," says Mr. Reeves, in explaining the sources from which his work is compiled, "by travelling out of the record, I mean out of the Statutes and Year Books, the Parliament Rolls, and Law Tracts," p. 11.

† Const. Hist. vol. i. p. 17, note (2d edit.).

‡ Care should be taken to purchase Dr. Stuart's Edition (*the second*) as the first contains no references to authorities, nor Dr. Stuart's Dissertation.

of England, with a Commentary on Magna Charta, and illustrations of many of the English Statutes," by the late Dr. Sullivan, the Royal Professor of Common Law in the University of Dublin,—is a work well worthy of the student's attention. They contain an elegant, elaborate, and systematic explanation of the Feudal System, amongst many other topics; and in the "Preliminary Discourse concerning the Laws and Government of England," by Dr. Gilbert Stuart (the opponent of Robertson), who edited the second edition, will be found a rapid and masterly view of the progress of the Constitution. The luminous and comprehensive summary which constitutes the last chapter in Blackstone's Commentaries,* is excellently adapted to keep in the student's mind the leading events in our Constitutional History, in their due order, and prominence, and proportion; to indicate distinctly the various stages of growth and change in the Constitution; the struggles between—the alternate elevation and depression, but ultimately harmonious adjustment and equipoise—of monarchical, aristocratical, ecclesiastical, and democratical power. In Lord Brougham's "Political Philosophy," also, will be found a Treatise on the English Constitution; † in its origin, progress, and existing condition. It is a rapid and popular commentary upon the subject, generally characterised by fairness and moderation; but the author would by no means wish to be considered as subscribing to *all* the opinions put forth by Lord Brougham.

* "Of the Rise, Progress, and Gradual Improvements of the Laws of England," pp. 407—443.

† Vol. iii. pp. 191—322. It has been recently [1844] published separately.

SIR MATTHEW HALE'S HISTORY OF THE COMMON LAW, very learnedly edited by Mr. Serjeant Rimmington (published in two volumes 8vo in 1794) is a work which ought by all means to be procured and carefully perused by the student. "So authoritative an History of the Common Law of England," justly observes the Serjeant, "written by so learned an author, requires neither preface nor recommendation. It has ever been justly held in the highest estimation, and, like the virtues of its author, been universally admired and venerated. Here the student will find a valuable guide, the barrister a learned assistant, the court an indisputable authority." The work is well worthy of this encomium. It has long been recognised as, in effect, an authoritative exposition of the chief grounds of the common law; and as such is continually quoted by Blackstone in his Commentaries, and cited in all our courts. Still it is to be considered not a complete performance, but "a sketch of what was probably intended by the learned author." * It consists of twelve chapters; and in addition to the notes and references at the foot of each page, there are appended more elaborate notes, at the end of each chapter.—This work, (to which is usually added Sir Matthew Hale's "Analysis of the Civil Part of the Law," which forms the basis of Blackstone's Commentaries) may be had cheap.—The edition used by the author is that of 1779, in one 8vo volume.

The student is possibly far more familiar with the *name*, than with the real character and merits, of MR. HALLAM'S "CONSTITUTIONAL HISTORY OF ENGLAND." No one can understand or appreciate this admirable work, who has not, before entering upon it, become familiar with

* Bridgman's Leg. Bibliog., p. 146.

at least the leading events of English history ; and no one has made any sensible advance towards the enviable character of a sound constitutional lawyer, who is not *thoroughly familiar* with the work. Not that it is altogether free from error ;* but where is to be found any other political author exhibiting such a rare union of candour, learning, and sagacity, as characterises this bold and independent writer ? This is a work admirably calculated to complete the student's course of English History ; to gather up its results, to place its most important events in their true bearing—their lights and shadows distinctly before him,—to enable him, in short, to determine their true character and value. Mr. Hallam's "CONSTITUTIONAL HISTORY OF ENGLAND" really commences, not in the work just mentioned, but in his "MIDDLE AGES," (Chapter VIII., Parts 1, 2, 3,) which are devoted respectively to the Anglo-Saxon Constitution, the Anglo-Norman Constitution, and the important period from the reign of Edward I. to the end of Henry VI. The "CONSTITUTIONAL HISTORY" takes up the subject at this point—commencing with the reign of Henry VII., and terminating with that of George II. It is singular that this circumstance should have escaped the notice of Lord Brougham, who assigns as one of his chief reasons for entering at large, in his "Political Philosophy," into the earlier stages of the British Constitution, Mr. Hallam's having chosen to commence his work with the reign of Henry VII. "His treatise," says Lord Brougham,† "and that of Lord John Russell, have one great defect in common,—they begin with the Tudors.

* Lord Brougham differs somewhat roughly from Mr. Hallam, who considers the Church to be a Corporation.—*Pol. Philos.* vol. iii. p. 310 (note).

† *Pol. Phil.* vol. iii. p. 321 (note).

Now, it is quite undeniable that the foundations of our constitution were laid many centuries before the fifteenth; nor can any one hope thoroughly to comprehend it who has not gone back to the earliest times. I have never been able to understand why those able and learned authors have both begun with Henry VII." It is to be hoped that Lord Brougham will correct this error in another edition. Before quitting this subject, let us state that Mr. Hallam is a member of the Bar, and a Bencher of the Inner Temple; and very proud are we in being able to claim for our profession the honour of numbering among its members so eminent a scholar and historian. Another able and excellent historian—Mr. Adolphus, senior, is also a member of the Bar, and of the Inner Temple; and has nearly completed the second and greatly enlarged and improved edition of his "History of the Reign of George III." The former edition is recommended for perusal (coupled with Belsham's History) by Professor Smyth, who cites and comments upon several portions of the work. The present edition has been prepared with great care and labour, and a manifest anxiety to preserve strict impartiality. Mr. Adolphus has had constant access to the State Paper Office, and has also availed himself of many private and exclusive sources of authentic information; and the present writer has on many occasions met with valuable information in Mr. Adolphus's History, after searching elsewhere for it in vain.

Two well-known noblemen—Lord John Russell and Lord Mahon (it need hardly be said, of opposite political views) have also made valuable contributions to the cause of historical literature; each expressing decided and independent opinions, and, rather singularly, commencing

from the same point, viz., the Peace of Utrecht (31st March, 1713). Lord John Russell has published two volumes, the first in 1824, the second in 1829; reaching to the close of Sir Robert Walpole's administration in 1742. He proposed to add a third, ending with the American War, and a fourth, with the death of Louis XVI. The anxieties and labours of an active political life have, however, hitherto prevented the fulfilment of his intentions. Lord Mahon's History comes down to the Peace of Paris in 1763. It is comprised in four octavo volumes, published successively between the years 1836 and 1844; and contains a great quantity of valuable and *original* information, acquired from authentic sources never before opened to the public. It is written in a lively, entertaining style, and with uniform temper and impartiality. It is, in short, a substantial and permanent acquisition to one of the most important departments of English literature.—The last two chapters of the work (Chapters XXXIX. and XL.), are devoted to a brief but impressive account of the rise and progress of our Indian Empire: and as a specimen of Lord Mahon's style, the commencement of this section of his labours is given beneath, in the note.* The student is

* "If, in some fairy tale or supernatural legend, we were to read of an island, seated far in the Northern seas, so ungenial in its climate, and so barren in its soil, that no richer fruits than sloes or blackberries were its aboriginal growth; whose tribes of painted savages continued to dwell in huts of sedge, or, at best, piled together altars of rude stone, for ages after other nations, widely spread over the globe, had already achieved wondrous works of sculpture and design,—the gorgeous rock temples of Ellora, the storied obelisks of Thebes, or the lion-crested portals of Mycenæ: If it were added, that this island had afterwards, by skill and industry, attained the highest degree of artificial fertility, and combined in its luxury the fruits of every clime; that the sea, instead of remaining its barrier, had become almost a part of its empire; that its inhabitants were now amongst

assured that it is of far more importance than he may at present be able to appreciate, for an English lawyer to be acquainted with Anglo-Indian history.

The "STATE TRIALS" are to be regarded as a grand storehouse of constitutional knowledge: and the political

the foremost of the earth in commerce and in freedom, in arts and in arms; that their indomitable energy had subdued, across fifteen thousand miles of ocean, a land ten times more extensive than their own; that in this territory they now peacefully reigned over one hundred and twenty millions of subjects or dependants, the race of the builders of Ellora, and the heirs of the Great Mogul! If, further still, we were told that in this conquest the rule of all other conquests had been reversed—that the reign of the strangers, alien in blood, in language, and in faith, had been, beyond any other in that region, fraught with blessings; that humanity and justice, the security of life and property, the progress of improvement and instruction, were far greater under the worst of the foreign governors, than under the best of the native princes;—with what scorn might we not be tempted to fling down the lying scroll, exclaiming, that even in fiction there should be observed some decent bounds of probability; that even in the Arabian Nights no such prodigies are wrought by spells or talismans,—by the lamp of Aladdin, or the seal of Solomon. To the marvels of this, the most remarkable event in politics since the discovery of the New World—the subjugation of India by the English—might be added, how seldom and how imperfectly its particulars are known to the English themselves. Men of education and knowledge amongst us, will generally be found far better versed in other modern achievements of much less magnitude, and in which our countrymen had no concern. The reason is, I conceive, that the historians of British India, some of them eminent in other respects, all require from their readers, for their due comprehension, a preliminary stock of Eastern lore. Perhaps a stronger popular impression might be produced by a less learned and less copious work. Meanwhile, to trace the origin of our Eastern greatness, in a slight but clear and faithful outline,—however feebly performed,—is at least no unworthy aim. I shall endeavour, in this and the following chapter, to shadow forth the first part of the career,—sometimes, it is true, marred by incapacity, and sometimes stained by injustice,—but, on the whole, the cause of genius and of valour, by which, in less than fifty years, *a factory was changed into an empire*."—History of England, from the Peace of Utrecht, by Lord Mahon, vol. iv. pp. 418—420. A very able and eloquent account of the rise, progress, and present state of the British empire in India, will be found also in the 51st and 52d chapters of Mr. Alison's History of Europe (vol. vii. pp. 1—216, 1st edit.).

student should frequently refer to them, and make those most important, the subject of diligent study. Every occasion of a state trial almost necessarily involves the thorough discussion of some important principle of constitutional law ; and as the counsel engaged, and the presiding judges, are almost always the ablest lawyers living, the arguments of the former, and the rulings and charges of the latter, cannot fail to supply matter for instructive reflection. If the student have not sufficient leisure to study any great number of these trials, he should at any rate make a point of acquainting himself generally with them, and the mode of readily referring to them. There are two voluminous collections of the State Trials—one by Mr. Hargrave, (the very learned editor of Coke upon Littleton), and the other by Mr. Howell. The former is in eleven folio volumes, (not too large however to be bound together in five, or six) ; and reaches from the reign of Henry IV. to the 19 George III. [i. e. 1779]. Mr. Hargrave's Preface should be read attentively. The latter Collection of State Trials, by Mr. Howell, is accompanied by Notes and Illustrations, and a general index ; and extends from A. D. 1163 to 1827. There is also a separate and very elaborate Index to the latter work, in one large octavo volume, by Mr. Jardine. Mr. Hargrave's work is marked in the catalogues at 4*l.* 4*s.* ; Mr. Howell's at 16*l.* 16*s.* ; Mr. Jardine's Index being 1*l.* 11*s.* 6*d.* additional.

Before concluding this chapter, it is requisite to impress upon the student how indispensable is a *ready* and accurate knowledge of the DATES of all the leading events of English history—particularly of the exact periods of the accession of each sovereign to the throne. Due pains should be taken to acquire and retain this important

species of information: the consequences of error in such matters being sometimes very painful, and serious. "Dates," says Sir Harris Nicolas, in a paragraph already quoted,* "are to history, what the latitude and longitude are to navigation—fixing the exact position of, and serving as unerring guides to, the object to which they are applied." Without this knowledge, the student will be—as it were—always in a fog: perpetually confounding cause and effect: the history of his country being to him, in fact, a dead letter—a mere 'old Almanack.' In Sir Harris Nicolas's valuable work on Chronology, from which the above quotation has been made, will be found much important information on this subject: and one fact established by that accurate and learned writer is so important as to warrant us in here calling special attention to it. "It is a remarkable and discreditable fact," says he, "*that every table of the regnal Tables of our Sovereigns before printed, is erroneous,—not in one or two reigns only, but in every reign from the time of William the Conqueror to that of Edward IV. These errors have caused every document dated, and every event which took place, on any day in the regnal year included in the period in which these errors occur, to be assigned to one year of our Lord earlier than that to which they actually belong! That errors so destructive to truth, whence history, like philosophy, derives all its usefulness and importance, should have been so long allowed to pass without correction, must surprise those labouring in the exact sciences, whose tables include the smallest fractions of time, and wherein an error of a few seconds would be fatal to the calculations of the astronomer and mathematician.*"†

* *Ante*, p. 145.

† Chronology of History, Pref. p. xiv.

Such are the observations which the author offers, with great diffidence—after some experience, and much inquiry—upon this most important subject, the young lawyer's study of English history. Happy will the author esteem himself, if any suggestion of his should prove the means of stimulating a single student to exertion, and facilitating the acquisition of that species of knowledge with which, in these stirring times, no man can safely or creditably dispense. *Without* a fair measure of it, how uninteresting and even incomprehensible must be three-fourths of the debates in Parliament—how dull and disheartening our Statute-book! *With* it, both of them will be unfailing sources of interest and instruction.—How totally different an aspect does a volume of English history present to two persons, one of whom is possessed, and the other destitute, of such knowledge! It is in the case of the former only, that can be verified the beautiful observation, that History is PHILOSOPHY TEACHING BY EXAMPLES!*

* This saying is generally attributed to Lord Bolingbroke; but, from the following passage in his writings, it would seem that he only quoted it from some one else:—"What, then, is the true use of history! • • I will answer you by quoting what I have read somewhere or other in Dionysius Halicarnassensis, I think,—that 'history is philosophy teaching by examples'."—*Works*, vol. iii. p. 323.

CHAPTER VIII.

DIFFERENT DEPARTMENTS OF THE PROFESSION—

CIVIL, CRIMINAL, ECCLESIASTICAL.

HAVING prudently determined upon adopting the legal profession, the next question, and one requiring deliberate consideration, is—which of its departments should be selected? Let us endeavour to continue our assistance to the student, by exhibiting to him a correct outline of the country before him—of the entire legal profession, in its existing state, and as he will find it, upon adopting that branch of it which he may have deemed most eligible. Nor let him imagine, as is too generally the case, that correct and distinct notions upon this subject are requisite *merely* for the purpose of guiding him in the selection of a particular province of the profession. He must, on the contrary, if anxious to become a creditable, enlightened, and completely successful practitioner, continually bear in mind, that however intricate may be the boundaries of jurisdictions, however numerous the courts, however varied their modes of procedure,—they have all, whether civil, criminal, or ecclesiastical, one and the same object in view—the *discovery of truth*, and the *administration of justice*. They have different methods of doing this, according to the

different natures of the rights, duties, liabilities, and injuries with which they have to deal, and upon which they adjudicate sometimes exclusively, sometimes concurrently, and at other times in aid of one another : and the distinction between their respective provinces, though sometimes very refined and difficult to be perceived, it is of essential importance to be apprised of ; for very perplexing questions are often and suddenly arising, in the course of litigation, as to whether the subject-matter of it falls properly within the jurisdiction which has been selected, or at all events might not have been far more speedily and advantageously dealt with, in another. The consequences of error in such cases are often very serious—sometimes ruinous. Out of many illustrations occurring to us, let us take the single instance of a LEGACY. According to circumstances, it either *may*, or must be, sued for in a court of Common Law, or a court of Equity, or an Ecclesiastical court : and an injudicious or erroneous selection of one of these courts, may quickly entail fruitless expenses, trebling the amount of the legacy itself !* Again. An extensive knowledge of the different departments of the profession, will often suggest to the practitioner in any of them, most important collateral and subsidiary movements in aid of the principal proceeding which has been adopted ; of which a little illustration occurred, only a day or two ago, in the course of the author's own practice. An action was pending

* If the executor have clearly *assented* to the bequest of a specific legacy ; or (for good consideration) expressly promised the legatee to pay it, he may sue for it at *law*. If charged on *personal* estate, the legacy may be sued for in either the ecclesiastical court, or a court of equity : but if charged on *real* estate, or, though charged on personal estate, if involved in a *trust* which has not been completely fulfilled, so as to leave nothing for the executor-trustee to do, but pay the legacy (*Grignon v. Grignon*, 1 Hagg. Consist. Rep. 545 ; and *post*, chap. ix.), then the ecclesiastical court has no jurisdiction, and the suit must be instituted in a court of equity.

upon a promissory note for a large amount, which had been given to the lender, by the principal debtor, and the defendant (his aunt) as his surety. The former became insolvent; and the payee of the note immediately sued the surety, who was a responsible person. The plaintiff, however, found himself suddenly encountered by a serious difficulty, in showing the signature to be that of the defendant; whose niece, it seemed, had signed it, in her aunt's name, and by her express direction. The former was now, however, disposed to deny having had authority for doing so; and no one else was present at the time of the signature, but the insolvent principal debtor—whose evidence was expected to be also hostile. It suddenly occurred to the plaintiff's attorney, in this dilemma, to go to the *Insolvent Court*, and oppose the insolvent's discharge, in order to have the opportunity of examining him quietly upon the matter, without his being aware of the true object of the examination. This was done; and there was adroitly extracted from the unsuspecting insolvent, upon oath, a clear acknowledgment that he had heard the defendant authorise her niece to affix her aunt's signature to the note, and had seen the signature affixed accordingly. A day or two afterwards, the insolvent was served with a subpoena to prove this fact, on the trial of the cause: and the instant that the defendant's advisers heard of that fact, they '*struck*,'—on the very day of the trial, when the cause was on the eve of being called on; and the defendant most unexpectedly submitted to a verdict by consent for the full amount, which was duly paid. But for this ingenious manœuvre, the plaintiff would in all human probability have been defeated. The author could have cited many similar instances of the signal advantage derived from a knowledge of the prin-

ciples and practice of other courts than the particular one in which proceedings had been instituted; but his limits prevent him.

How can a man be a good *Pleader*, either in court or chamber practice, who is not well acquainted with real property law? Or a good *Conveyancer*, who has not a sound knowledge of the rules of evidence—of the construction of legal language, and the effect given to legal instruments by courts of law or equity? How can an *Equity counsel* venture to open his lips in a court of equity, except on a few subordinate and routine matters, who is not well versed in the general rules and doctrines of courts of law? “I know from long personal observation and experience,” said Lord Eldon, “that the great defect of the Chancery Bar is, its ignorance of common law and common-law practice: and strange as it should seem, yet almost without exception it is, that gentlemen go to a Bar where they are to modify, qualify, and soften the rigour of the common law, with very little notion of its doctrines or practice!”* Such is the authoritative statement made by that profound equity judge, who was himself consummately acquainted with both law and equity; who had gone the Northern Circuit for many years; and most strenuously urged that step to be also taken by the gentleman whom he was advising. “After all,” says his lordship, in the same letter, “when, tolerably well furnished, you have begun your chancery practice, go in the spring and summer, for some years, the circuit. That practice will keep alive your common law knowledge, and enable you to improve in your knowledge of equity.

* Life of Lord Eldon, by Twiss, vol. ii. p. 51 (1st edit.).

But it hath, besides, many weighty advantages both for the time and in future life. On the recommendation of great men now no more, I followed it, even till it became injustice to my equity clients."* A most humiliating but instructive instance of the perilous consequences of neglecting such advice,—of the ignorance of each other's province by common lawyers and equity practitioners—has been placed permanently upon record by the late experienced Mr. Chitty, in his work on the General Practice of the Law.

"Recently a *common-law* barrister, very eminent for his legal attainments, sound opinions, and great practice, advised, that there was *no remedy whatever* against a married woman who, having a considerable separate estate, had joined with her husband in a promissory note for 2,500*l.* for a debt of her husband; because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect †; not knowing, or forgetting, that, in *Equity*, under such circumstances, payment might have been enforced out of the separate estate ‡. And afterwards, a very eminent *Equity* counsel, equally erroneously advised, in the same case, that the remedy was only in equity: although it appeared, upon the face of the case, as then stated, that after the death of her husband, the wife had promised to pay, in consideration of forbearance, and, upon which promise, she might have been *arrested* [before the statute abolishing

* Life of Lord Eldon, by Twiss, vol. ii. p. 52.

† Marshall v. Rutton, 8 T. R. 545.

‡ Bullpen v. Clarke, 17 Ves. jun. 366; Hulme v. Tenant, 1 Bro. Part. Cas. 16; Stewart v. Lord Kirkwall, 3 Madd. Rep. 387; Bingham v. Jones, at the Rolls, 1832—Chitty on Bills (8th ed.), 791; Field v. Sowle, 4 Russ. Rep. 112.

arrest on mesne process] and sued at law*. If, now, the common-law counsel had properly advised proceedings in equity, or if the equity counsel had advised proceedings by arrest, at law, upon the promise made after the husband's death, the whole of this large debt would have been paid. But, upon this latter opinion, a bill in Chancery was filed: and so much time elapsed before decree, that a great part of the property was dissipated, the wife escaped with the residue into France, and the creditor thus wholly lost his debt, which would have been recovered, if the proper proceedings had been adopted in the first or even second instance!—This is one of the *very numerous* cases almost daily occurring, illustrative of the consequences of the want of at least a general knowledge of *every* branch of law.”†

One such instance as the foregoing, speaks trumpet-tongued to the student, even before he has made his selection of the common-law, or equity court, or the criminal, or ecclesiastical, branch of the profession. The author has often heard members of the equity bar, after a chance day's attendance in a common-law court, during an argument incidentally involving topics of equity, reproach common lawyers with their utter ignorance of equity; and complaints from common lawyers, after listening to a discussion in a court of equity involving common-law topics, of equity counsels' complete ignorance

* *Lee v Moggeridge*, 5 Taunt. Rep. 36; *Littlefield v. Shee*, 2 Barn. & Adolph. 811.

† *Chit. Gen. Pr. of the Law*, vol. i. Pref. viii. note (a), 2nd ed. Had not Mr. Chitty's respectable name guaranteed the truth of this statement, one should have felt a difficulty in believing it. For the credit of the profession, it is hoped, that instances of such glaring ignorance, on the part of "eminent" counsel, at all events, are of very rare occurrence.

or misconception, and consequent misrepresentation of them. Why should this be? when, moreover, there is scarce a day in which an equity judge does not inquire, "How would this be, at law? What action would lie? Could such and such a thing be pleaded, or admitted in evidence?" or the Common Law Judges make corresponding inquiries concerning Equity proceedings.

Notwithstanding the notoriety of the *nominal* distinctions between the different departments of the profession, laymen have seldom any distinct notions upon the subject. Some imagine that one and the same counsel practises in all the different branches of the law; while others conceive that these branches are as completely separate, as rigidly distinguished from one another, as if they were totally distinct professions, requiring entirely different qualifications, habits, and capacities. A justly celebrated writer, Miss Edgeworth, has committed a series of ludicrous mistakes of this sort, in one of her principal novels, that entitled "Patronage." Her hero is a Mr. Alfred Percy, and great pains have been bestowed upon the description of his professional pursuits and occupations, as an ambitious and rising lawyer. Though in her Preface she vindicates her frequent use of professional technicalities, she is really quite in the dark as to the walk of life which she has undertaken to delineate; having no more distinct notion even of the difference between the functions of barristers, and those of attornies and solicitors, than of that which exists between common law, equity, and conveyancing: as any professional friend could have told her, who might have been consulted before the publication of her entertaining story. She has, consequently, made Mr. Percy a very mongrel character indeed: now,

an attorney, sent into the country to inquire into the management of an estate, &c. ; then, a conveyancer, drawing marriage settlements ; and, finally, a pleading barrister, at one time eloquently haranguing judge and jury, at another drawing pleadings ; in which latter capacity, by the way, he is represented as drawing, for the *same* party, in the same suit, both " Replication " and " Rejoinder "—*i. e.*, making his own client both plaintiff and defendant !

It is perfectly true that there are broad lines of demarcation between the different departments of practice, arising out of the adoption, especially within the last hundred years, of the principle of the *Division of Labour* in the legal profession. There are those by whom this has been gravely deprecated, as almost necessarily tending to contract the range of acquirement, and enfeeble the mental powers, of practitioners. " The distribution of legal practice," observes the learned and accomplished Mr. Starkie, " into so many distinct branches, each containing its own peculiar technical rules and practice, and enjoying, as it were, its own independent jurisdiction, has a tendency to make those who devote themselves principally to any one particular branch, too apt to wrap themselves up in their own technicalities ; to attach a higher degree of importance to their favourite study than it really deserves ; and, in proportion, to undervalue the importance which belongs to the learning and labour of those engaged in different departments."* These observations are worthy of being constantly borne in mind by both students and practitioners, as having a tendency to open and liberalize their views, and elevate their character

* *Introd. Law Lecture at the Inner Temple (1834). Legal Examiner, vol. ii. p. 449.*

from that of a mere petty plodder, into that of an able and enlightened lawyer. Notwithstanding the *tendency* thus deprecated, the subdivision of the profession has long ago become a matter of absolute necessity, owing to the altered character of social exigencies, to which legal institutions must necessarily adapt themselves. The amazing intricacy, complexity, and artificial refinements of rights and liabilities, in respect of persons and property, in modern times, when contrasted with the comparative simplicity and uniformity of former days, have had the natural and necessary effect of classifying those general principles by which they are regulated, and thus gradually developing new distributions of jurisdiction. "In the original formation of all independent states, redress for every kind of crime or injury, has usually," as was correctly observed by the late Mr. Chitty, "been afforded in *one general court*, and without much regard to precise form. As population and the intricacy of transactions increased, it was found, that by a division into several different courts, and appropriating a particular description of business to each, the judges and practitioners, having more time to attend to their particular departments, necessarily became better acquainted with them; and not only decided more correctly upon the substantial questions, but also framed more appropriate rules and forms of proceedings; and, in the result, more efficiently administered justice according to the varying nature of each case."*

* Gen. Prac. Law, vol. ii. p. 304 (2d ed.). See a very interesting chapter (xix) in Mr. Babbage's "Economy of Machinery and Manufactures," on the *Division of Mental Labour*, as illustrated by the celebrated "Tables" of M. Prony: and also the forcible observations of the Bishop of Llandaff (Dr. Copleston) in his Reply to the Edinburgh Reviewers, pp. 107—112.

Few things are more interesting, in even an historical point of view, than the rise and progress of the different courts; their modes of acquiring jurisdiction; their desperate struggles with each other on this point; and the ludicrous and contemptible nature of the devices adopted, for this purpose, by two of our most elevated tribunals.* Some of the superior courts gradually succeeded in their efforts of encroachment and usurpation; but the struggles of the inferior courts were effectually checked and restrained by their more powerful competitors. "Now, however," to adopt the language of the late Sir John Nicholl, "times are changed. A more liberal and enlightened view of questions of jurisdiction is taken. On the one hand, the Ecclesiastical Courts have no disposition to encroach, *ampliare jurisdictionem*; and on the other hand, Temporal Courts have no jealousy—no wish to resort to fictions and to technicalities. They look, where not bound by former decisions in point, to the real substance and sound sense

* The Court of *Exchequer* obtained cognizance of civil suits properly belonging to the Common Pleas, by resorting to the pure fiction of the plaintiff's being a *debtor to the Crown*—and that by means of the defendant's not paying what was due to the plaintiff, *he* could not pay what *he* owed to the Crown!—The Court of Queen's Bench hit upon another device to secure a similar object: it pretended that a person charged with any pecuniary liability had committed some *TRESPASS* bringing him within the jurisdiction, and subjecting him to the authority, of that court: and that he was then liable to be sued there for the *debt* claimed from him! In Lord Mansfield's time, a defendant took it into his head to challenge the existence of the *right* to such jurisdiction by the King's Bench! The plaintiff demurred to the plea, and got judgment in his favour, the Court declaring, "that if ever such a plea should come before it again, *it would inquire by whom it had been signed!*" [i. e., hold the *counsel* guilty of contempt of court.] See Tidd's Practice, p. 102 (9th edit.) "Pleased as we are with the *possession*," says Blackstone [ii. *Comm.* p. 2] speaking of the origin and growth of property, "*we seem afraid to look back to the means by which it was acquired—as if fearful of some defect in our title!*"

of the question—to that which is really more beneficial to the suitors—the public and subjects of the country. There is quite as much business in all the courts as, under the increase of wealth and population, the institutions are able to discharge.”* To enter further, however, into these subjects would be inconsistent equally with the object of this work, and its limits. We refer the student, for full information, to the elegant and interesting outline of the jurisdiction of the several courts in England, to be found in the Third Book of Blackstone’s Commentaries (Chapters III.—IV.) and the more copious and recent account to be found in the second volume of Mr. Chitty’s General Practice of the Law, Chapter V. In the immediately ensuing chapters will be found, it is hoped, a correct, useful, intelligible, and popular outline of all the great departments of the legal profession; such as will really assist the student in making his election at the outset. Our purpose will have been answered, if enough shall have been said in this chapter, to satisfy an intelligent student, that there is far more *in common between* the various courts established in this country, than of that which is *peculiar to each*; that it is consequently degrading, foolish, and mischievous to think of shutting his eyes to everything beyond the particular province in which he intends to practise; that a competent *general* knowledge on this subject can be acquired at the very outset of his career, and without much difficulty; that it will sensibly facilitate and render interesting his particular studies;

* *Grignon v. Grignon*, 1 Hagg. Eccles. Courts, 545. The student will find many valuable observations in this judgment, with reference to the question of the different jurisdictions in England. See also 2 Chitt. Gen. Pr. 307 (2d ed.).

enable him to practise his profession in a superior style; and prepare him, in due time, to occupy its highest posts with comparative ease. Let him consider how one or two of the more eminent counsel of the present day, shine equally in the most arduous contests in courts of Equity, Common Law, Criminal Law, and Ecclesiastical Law; and how the late Lords Kenyon and Eldon, and the present Chancellor, Lord Lyndhurst, have presided, with equal and pre-eminent ability, in the Court of Chancery, and in Courts of Common Law.

The three grand divisions of the Legal Profession, as already intimated in this chapter, are the Civil, the Criminal, and the Ecclesiastical: the general nature of which may, for the present purpose, be briefly and popularly thus stated.

I. The CIVIL Division includes the department of Common Law (properly so called); Conveyancing; Equity (including the tribunals for administering the law of Bankruptcy and Insolvency); and the law and practice before the House of Lords, the Privy Council, and Parliamentary Committees.

II. The CRIMINAL Division comprises the administration of the CROWN LAW (as it is termed) by the Court of Queen's Bench at Westminster, consisting principally of a sort of *quasi* Criminal Law—e. g. Indictments for Libels, Nuisances, the Repair of Roads, Bridges, &c. &c., Informations, Quo Warranto, Mandamus, Certiorari, and the judicial decision of questions concerning the Poor Laws; and the GENERAL CRIMINAL LAW of the kingdom,

as administered either in the Court of Queen's Bench, or at the Sessions, in London and Middlesex; and, in the country, at Sessions, and the Assizes.

III. The ECCLESIASTICAL Division includes the courts for the administration of Ecclesiastical law (i. e. civil and canon law) respecting Spiritual Offences, Ecclesiastical Rights, Wills of Personalty, and Matrimonial and Defamation causes. To this department may also be referred the ADMIRALTY Court: because the practitioners in it are Advocates, Surrogates, and Proctors; the method of procedure is according to the method of the civil law, like that of the Ecclesiastical Courts; and it is usually held at the same place with the Superior Ecclesiastical Courts, in London, viz. at Doctors' Commons.

We shall in the ensuing chapters give a full description of these various sections of the legal *vineyard*—if we may use the term—of the labourers in them, and of the nature of their duties.

CHAPTER IX.

DIFFERENT DEPARTMENTS OF THE PROFESSION—

I. CIVIL DEPARTMENT.

PART I.—EQUITY.

THE difference between LAW and EQUITY, which are two distinct co-ordinate systems for administering justice, in civil cases, in this country, is one of such cardinal importance, and a clear conception of it so indispensable to any one aiming at only a moderate *general* acquaintance with the principles of our jurisprudence, but especially to one intending to become either an Equity or Common-Law practitioner, that it is surprising how much misunderstanding, and consequent misrepresentation, exist upon the subject, even among professional persons. We shall endeavour to account for the prevalence of such errors; and then proceed to give a faithful but popular account of this, one of the grandest characteristics of our English system of jurisprudence. We shall content ourselves with delineating the existing state of equity jurisdiction: it being, however interesting, beyond the scope, and inconsistent with the limits, of this work, to attempt to trace the origin and growth of such jurisdiction.

“The very terms,” says Blackstone,* “of a court of

* 3 Bla. Comm. 429.

equity, and a court of *law*, as contrasted with each other, are apt to confound and mislead us." By some writers of no mean celebrity, the student, or a foreigner, would be led to infer that Law and Equity, with lynx-eyed jealousy of each other, were continually at warfare ; eternally striving to encroach on each other's province ; to frustrate and render utterly nugatory each other's most deliberate proceedings : "as if," to adopt the language of Blackstone's masterly Chapter on Equity above referred to,* "the one judged without equity, and the other was not bound by any law." What other than such an inference is to be drawn, for instance, from the following opening paragraph of an interesting and learned little publication† by Sir Francis Palgrave, and evidently based upon an erroneous recollection of a paragraph at the commencement of Letter II. of Sir Edward Sugden's "Letters to a Man of Property" (p. 3) ?

"Amongst the many peculiarities which characterise our legal institutions, there are none more remarkable than those offered by the courts of "*equitable*" jurisdiction, when distinguished from the courts of *common law*. It must appear a singular anomaly to a foreigner, when he is informed, that *our English tribunals are marshalled into opposite and even hostile ranks* : guided by maxims so discrepant, that the title which enables the suitor to obtain a decree without the slightest doubt or hesitation, if he file a bill in equity, ensures a judgment against him should he appear as plaintiff in a declaration at common law : and exercising their respective jurisdictions by means of forms and pleadings, *which have as little similarity as if*

* 3 Bla. Comm. 429.

† "Essay on the Original Authority of the King's Council." Printed under the direction of the Record Commissioners, 8vo (1834), page 3.

they existed amongst nations whose laws and customs were wholly strange to each other."

Law and equity "*marshalled into opposite and hostile ranks!*" Such may be a sufficiently correct description of the state of matters in the infancy of the system of equity—when its principles were equally misunderstood by its own ambitious professors, and by the obstinate and jealous common-lawyers; as in the time of the "notable dispute"* between Lord Ellesmere and Sir Edward Coke, in the year 1616, on the question, *whether equity could relieve after, or against, a judgment of a court of law*. The two courts were, at that time, truly enough, "*marshalled into hostile ranks;*" and to such a pitch were matters carried, that indictments were preferred against the suitors in equity, the creditors, nay, even against the counsel, and a master in chancery, for having incurred a *præmunire*, by questioning, in a court of equity, the validity of a judgment at law, which had been obtained by gross fraud and imposition!—But how can any one, practically acquainted with the two systems, so characterise *their present relations* to each other, after a lapse of nearly two centuries and a half?—In complete accordance with the last statement in the foregoing paragraph from Sir Francis Palgrave's publication, is the following representation made by a writer on law studies, for the guidance of those meditating an entrance into the legal profession:—"The practice of courts of equity, and of the courts of law, may be considered in the light of *two separate and distinct professions*. The difference between them is as clear and essential as that which marks any one business, or profession, from another. Not only is the intro-

* 3 Bla. Comm. 54.

ductory learning of the one, and of the other, of a distinct character, but the very constitution and habits of these courts require, in the persons practising in them, different descriptions of temperament and ability.”* In both of these paragraphs there is a tincture of truth ; but it is so much blended with error and misrepresentation, as to have a very mischievous tendency. Again. That acute but eccentric jurist, Jeremy Bentham, has characterised equity as being “that capricious and inconsistent mistress of our fortunes, whose features no one is able to delineate.”† Mr. Selden has stated, that “a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case ;” ‡ and Lord Kaimes informs us, that “the province of equity is, as contradistinguished from that of law, to determine according to the spirit of the rule, and not according to the strictness of the letter.” § Every one of the foregoing statements is based upon complete misconception of equity, as it has been administered in this country for nearly two centuries. “If a court of equity,” to adopt the language of Mr. Justice Blackstone, “did really act in this manner, it would rise above all law, either common or statute, and be a most arbitrary *legislator* in every particular case ;” || and the illustrious commentator has elsewhere correctly laid it down, that “every definition or illustration to be met with, which *now* draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either *totally* erroneous, or erroneous to a certain degree.” ¶ So

* Raithby's Study and Practice of the Law, in a Series of Letters, 2d ed., 8vo (1816), pp. 400, 401.

† Fragment on Government. Pref. p. ix. (2nd ed.)

‡ Table-Talk, tit. Equity.

§ Lord Kaimes, Pr. of Equity, p. 177.

|| 3 Bla. Comm. 433.

¶ *Id. ib.* p. 429.

far, indeed, is it from being true that equity sets itself to frustrate the law, that one of its fundamental maxims—one on which it is acting daily and hourly—is, that *Æquitas sequitur legem*—EQUITY FOLLOWS THE LAW; *i. e.*, adopts the rules of law, and where it goes beyond it, seeks out, and guides itself by the analogies, of the law. In his celebrated judgment in *Cowper v. Cowper*, 2 Peere Williams, 685, Sir Joseph Jekyll, the Master of the Rolls, so long ago as 1784, thus expounded the maxim in question:—“The LAW is *clear*, and courts of equity ought to follow it, in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri*; yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat*. And, as it is said in *Rook's* case (5 Rep. 99, *b*), that discretion is a science not to act arbitrarily according to men's wills and private affections; so the discretion which is exercised here, is to be governed by the rules of law and equity: which are not to oppose, but each in its turn to be subservient to, the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; BUT IN NO CASE DOES IT CONTRADICT OR OVERTURN THE GROUNDS OR PRINCIPLES THEREOF, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.”* Such, then, is the true re-

* The student is also referred to the instructive judgment of Lord Redesdale in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. pp. 607, *et seq.*

lation existing between the two systems. Instead of the object of equity being to cripple, thwart, and defeat law, equity anxiously endeavours to assist it; to supply its imperfections; to protect its power and authority from being abused; to give complete effect to its decisions; and, when the law has no effectual provision against a case of hardship or iniquity, to afford a comprehensive, permanent, and effectual remedy. "If the rigour of general rules," says the commentator, "does in any case bear hard upon individuals, courts of equity are open to supply the defects, *but not sap the fundamentals*, of the law."* In the following few lines, the same masterly hand has traced a clear outline of the true province of a court of equity in this country:—"To detect latent frauds and concealments, which the process of the courts of law is not adapted to reach: to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law: to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be attained by the rules of the positive or common law: this is the province of our courts of equity; which are cognizant, moreover, in matters of *property* only."† This terse and comprehensive‡ sketch of equity, by a great common-lawyer, tallies with the following elegant, faithful, and fuller one, subsequently given by that consummate master of equity, the late Lord Redesdale (Lord Chancellor of Ireland).

* 3 Bla. Comm. p. 59.

† 1 Bla. Comm. p. 92.

‡ "This," says, however, Mr. Justice Story, with perhaps not excessive caution, "is far too loose and inexact to serve the purposes of those who seek an *accurate* knowledge of the actual or supposed boundaries of equity jurisdiction."—1 Equity Jurisp. p. 54 (2nd ed.).

“Early in the history of our jurisprudence, the administration of justice by the ordinary courts appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles upon which the ordinary courts also decide, when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (contrary to the purpose of their original establishment) instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, *and the positive law is silent*. The courts of equity also administer to the ends of justice by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending litigation; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.”*

While such is undoubtedly a true description of the harmonious co-operation of law and equity, it cannot be denied that there are a few cases which would appear at first sight to be at variance with it; and no doubt it was the

* Mitford's Treatise of Pleadings in the Courts of Chancery, p. 3.

superficial consideration of them, which has led into error the writers who have spoken of the direct antagonism of the two. We shall select one single instance, as an equally interesting, and striking illustration of the operation of equitable principles, upon rules of law. In his zeal to vindicate the integrity of the common law, Blackstone denies it "to be the business of equity, in England, to *abate the rigour* of the common law."* We have seen, however, that eminent Equity Judge, Sir Joseph Jekyll (*ante*, p. 293), and especially that great lawyer, Lord Eldon (*ante*, p. 279), plainly declaring the contrary—that the office of equity *is* "to allay, modify, qualify, and soften the rigour of the common law:" and did ever man speak on such a subject with more of the authority due to strong and subtle intellect, vast experience, and profound learning? Again, the Commentator informs us, that "neither law nor equity can vary men's agreements, or, in other words, make agreements for them: one court ought not to abridge, nor the other extend, a *lawful provision deliberately settled* by the parties, *contrary to its just intent*. Both courts will equitably construe, but neither pretends to *controul*, or *change*, a lawful stipulation or agreement."† Now let us apply these observations to a contract of every day's occurrence—and of very great importance—one of MORTGAGE. This is an instrument executed deliberately, and solemnly, and lawfully; by which A, stipulates that if he do not, by a particular day, repay the 10,000*l.* advanced to him on security of his lands, by B, those lands shall from that day become the lands of B for ever. Now a court of law, according to the plain common-sense signification of the language of this instrument, regards it as an absolute conveyance of the lands, subject to a re-conveyance of them on the

* 3 Bla. Comm. p. 430.

† *Id. ib.* p. 435.

happening of a certain given event, viz., the repayment, on the day specified, of the mortgage-money. If it be not then punctually repaid, the mortgagor loses the land for ever*, by the forfeiture of the condition: all benefit of which, by the strict rule of the common law, is lost by failure to pay at the stipulated day†. Thus stood matters till the reign of James I.; when the court of equity went the length of laying down, as one of its rules, that no agreement of the parties for the exclusion of its interference, should have any effect‡; “a rule,” observes the author of an excellent elementary work on Real Property, recently published, and which will be noticed in an ensuing chapter, § “no less benevolent than bold; and a striking instance of that determination to enforce fair dealing between man and man, which has raised the Court of Chancery, notwithstanding the many defects in its system of administration, to its present power and dignity.” To the eye of a court of equity, this document—a Mortgage deed—afforded conclusive evidence of the transaction amounting merely to a TRUST, arising from the *nature of the security*—and that the parties really meant nothing more, notwithstanding the stringent language which they had used. This was simply adopting the rule of the Roman law—that though the debt for which the mortgage or pledge (*pignus*) had been given, might not have been paid at the stipulated time, such default did not amount to a forfeiture of the debtor’s right to the property, but simply clothed the creditor with authority to sell the pledge, and reimburse himself for his debt, interest, and expenses; the

* Litt. § 332.

† Burton’s Real Prop. p. 8, note (1st ed.).

‡ Seton v. Slade, 7 Ves. 273.

§ Principles of the Law of Real Property, by Joshua Williams, page 334.

residue of the proceeds of sale belonging to the debtor *. Our courts of equity, in the same manner, treated a mortgage as a mere *security* for the debt due to the mortgagee ; declared that the mortgagee held the estate, though forfeited at law, as a TRUST ;† and that the mortgagor had, what was significantly, and is now technically, termed, an ‘ *Equity of Redemption*,’ which he might enforce against the mortgagee, as he might have enforced any other trust, if he applied within a reasonable time to redeem, and offered a full payment of the debt, and of all equitable charges ‡. This was looked upon by the common-lawyers as a daring and dangerous innovation upon the doctrines of the common law, and was at first strenuously resisted, even as late as towards the end of the reign of Charles II. ; when we find that great judge, Sir Matthew Hale, lamenting that these equitable doctrines were “ *eating out the heart of the common law !* ” § The American jurists take a very different view of the matter. “ Perhaps,” says Mr. Justice Story, “ the triumph of common sense over professional prejudices has never been more strikingly illustrated, than in the gradual manner in which courts of equity have been enabled to withdraw mortgages from the stern and unrelenting character of *conditions* at the common law ; ” || while Chancellor Kent expresses himself in still higher terms of eulogy. “ The case of mortgages is one of the most splendid instances in the history of jurisprudence, of the triumph of equitable principles over technical rules ;

* Pothier, Pand. Lib. 20. tit. 5. Domat. I. b. iii. tit. 1. § 3, art. 1. 2 Story, Eq. Jur. p. 247.

† Seton v. Slade, 7 Ves. p. 283 ; Cholmondely v. Clinton, 2 Jac. & Walk. pp. 182—5.

‡ 2 Stor. Eq. Jur. pp. 251—2 ; 2 Fonb. Eq. b. iii. ch. i. § 13, and note (c).
§ Rosscarrick v. Barton, 1 Ch. Cas. 219. || 2 Eq. Jur. pp. 252—3.

and of the homage which these principles have received, by their adoption in the courts of law. Without any prophetic anticipation we may well say, that 'returning Justice lifts aloft her scale.'''* This rule has been, ever since it was originally laid down, with great caution, in the time of Charles I., so highly cherished and protected, that it has become a maxim, '*once a mortgage always a mortgage.*' The laudable object of the rule, is, to prevent oppression; and no contract whatever is strong enough to deprive the mortgagor of his equity of redemption: but all such agreements will be set aside, as founded in unconscientious advantages assumed over the necessities of the mortgagor.† The construction thus put upon a contract of mortgage, by the court of equity, the legislature, in 1784, came forward and required courts of law to adopt; statute 7 Geo. II. c. 20, (after reciting the different procedures of courts of law and equity), arming the former with exactly the same powers as were then exercised by the latter.—Such is an outline of this interesting subject; from which we see a court of equity boldly adopting the rule of the civil law, in defiance of the opposition of the common law courts; and the legislature not only sanctioning that adoption, but forcing it upon the common law courts.‡

Such being the mode in which a court of equity deals with a mortgage, is not the language of Lord Eldon,—that it is the province of equity to "modify, qualify, and soften the rigour" of the common law,—manifestly correct? But is it equally true that she has not, in the case of a mortgage, "varied, controlled, or changed, an agreement," and

* 4 Kent, Comm. p. 158. † *Seton v. Slade*, 7 Ves. 273, per Eldon C.

‡ About thirty years previously, viz. in 1705, the legislature had similarly interfered in the case of *Bonds* (stat. 4 & 5 Anne, c. 16. § 13). And see 3 Bla. Comm. pp. 435 and 439.

“abridged” or “extended a lawful provision of the parties deliberately made, *contrary to its just intent?*” It is submitted that equity has really construed the instrument only according to its “just intent,” as cannot but be obvious to every person who applies common sense to the situation of the parties, and the nature of the transaction; but in doing so, it would certainly appear rather difficult to hold, with Blackstone, that she has not, to a certain extent “controlled and varied” the agreement of the parties. Similar observations are perhaps applicable to the interference and relief by equity in cases of *penalties and forfeitures*,* which has undoubtedly been carried to an extent apparently inconsistent with the boundaries described by Blackstone to be assigned to a court of equity; and Lord Eldon has repeatedly expressed his grave disapprobation of courts of equity, thus “setting aside the legal contracts of men.”† The very power assumed by courts of equity in such cases, however, is now pretty freely exercised by the courts of law. It was solemnly decided in the case of *Kemble v. Farren*, 6 Bing. 181, and has been, ever since, established law, that though the parties, “in terms” (to adopt the language of Chief Justice Tindal in giving judgment) “than which it is difficult to imagine any more precise or explicit,” had declared, that in the event of either party breaking the stipulations in a theatrical agreement, he should pay to the other 1,000*l.*; “declaring not only affirmatively that it should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof:” nevertheless—in defiance of this distinct and deliberate expression of the inten-

* See Story, *Equit. Jurisp.* ch. xxxiii. for a very interesting view of this subject.

† See *Hill v. Barclay*, 18 Ves. 59—60.

tion of the parties,—a court of law will regard it as a *penalty* only: the Chief Justice avowing such a case to be “precisely that in which *courts of Equity have always relieved, and against which courts of law have in modern times endeavoured to relieve*, by directing juries to assess the *real* damages sustained by the breach of the agreement.” Nor is this the only instance in which courts of law have imitated equity in disregarding the strict letter of the law, while seeking to discover, and carry into effect, the real intention of the parties. Various other illustrations can be suggested to the student by any experienced practitioner whom he may consult. We will, however, mention one interesting instance of the kindred spirit actuating courts of law and equity, supplied by the law of *FIXTURES*—which, to adopt the language of Messrs. Amos and Ferard, in the brief but masterly Introduction to their “*Treatise on Fixtures*,” affords a remarkable illustration of the strong tendency which may be observed in the jurisprudence of a country, to adapt itself to the various manners and necessities of society. “The privileges which exist in respect of this species of property, are in derogation of the principles of the common law; and have been gradually introduced and established by the judges, who in this instance have exercised a sort of *legislative* authority. The strict rules of law respecting *WASTE*, which had their origin in feudal times, were found to be incompatible with the notions of property entertained in a more civilised age; and as the legislature did not interfere to abolish them, it became indispensably necessary that their practical operation should be modified and curtailed. The courts of law, therefore, though they did not venture to abandon altogether the principles of

the ancient law, considered themselves at liberty to *mitigate its rigour*; and accordingly engrafted upon it those exceptions, qualifications, and innovations, in the measures of feudal policy, which constitute the present law of fixtures."*

The harmonious co-operation between the two jurisdictions of law and equity, has existed for so long a period, that there rarely, or never, occurs any semblance of conflict between them. Common-lawyers are, on the contrary, quite as sensible of the utility of *equity*, as are its own professors; and cordially concur in recognising and preserving the boundaries between the two. We shall conclude our observations on this topic, by one single illustration, and by citing the opinion expressed by a very eminent Equity and Common-Law judge—the late Lord Kenyon.—Common-law courts take no notice of mere *equitable* rights; they regard the *legal* right only. For this reason, in the case of trustee, and *cestui que trust*, the former may maintain ejectment to turn out the latter—his own *cestui que trust*; who in such a case must resort to a court of equity to prevent him. This rule was followed out rigidly in the case of *Gibson v. Winter*, 5 Barn. and Adol. 96.† It was there decided that a trustee only *nominally* suing, and for the benefit of the party really and substantially interested, must, in a court of law, be treated in all respects as the true party in the cause. "If there be a defence against *him*, there is a

* Amos and Ferard on Fixtures. Introd. pp. xix. xx. The whole of this Introduction, extending to only ten pages, should be carefully read by the student. And see some just observations, to the same effect, by Mr. Justice Story (1 Eq. Jur. p. 19, 2nd ed.), with reference to the newly-developed Law of INSURANCE.

† Followed by the Court of Exchequer in 1840, in the case of *Wilkinson v. Lindo*, 7 Mees. & Welsb. 81.

defence against the *cestui que trust*, who uses his name." This principle was, in the case in question, thus applied. A broker, in whose name a policy under seal had been effected, and who consequently alone could sue upon it at law, brought, on behalf of his principal, an action of covenant against the assurers, who pleaded that they had *paid him* the amount claimed; and to prove this, showed that they had allowed him credit, on account, for certain moneys due from *him* to them. This was held, though no payment as between the assured and insurers, to be a good payment as between the *plaintiff* and them; and a complete answer to the action.—An attempt was made by the Court of King's Bench, in the time of Lord Mansfield, to exercise a species of equitable jurisdiction, by refusing, for instance, to allow a *cestui que trust* to be defeated by the legal title of his trustee, (see *Lyde v. Holford*, Bull. Nisi Pr., p. 110) and several important cases were decided in conformity with that principle. It was very soon afterwards, however, [1788] repudiated by that court as "calculated to confound the boundaries between the different courts," *i. e.* of law and equity. The student is referred to the cases of *Doe v. Staple*, 2 Term R., 684, *Good Title v. Jones*, 7 Term R., 46, *Doe v. Wroot*, 5 East, 138, and *Bauerman v. Radenius*, *ib.*, p. 663. It is in this last case that Lord Kenyon gave the following satisfactory exposition of the advantage and necessity of preserving inviolate the distinction between law and equity:—

"I have been in this profession more than forty years, and have practised both in courts of law and equity; and if it had fallen to my lot to form a system of jurisprudence, whether or not I should have thought it advisable to

establish two different courts with different jurisdictions and governed by different rules, it is not necessary to say. But I find that in these courts, proceeding by different rules, *a certain combined system of jurisprudence* has been formed, most beneficial to the people of this country, and which, I hope, I may be indulged in supposing, has never yet been equalled in any other country on earth. Our courts of law consider only legal rights; our courts of equity have other rules, by which they sometimes supersede those legal rules: and in so doing they act most beneficially for the subject. We all know, that if the courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. To mention only the single instance of legacies being left to women who may have married inadvertently: if a court of law could entertain an action for a legacy, the husband would recover it, and the wife might be left destitute; but if it be necessary, in such a case, to go into equity, that court will not suffer the husband alone to reap the fruits of the legacy given to the wife; for one of its rules is, that he who asks equity must do equity; and in such a case they will compel the husband to make a provision for the wife before they will suffer him to get the money. I exemplify the propriety of keeping the jurisdictions and rules of the different courts distinct, by one out of a multitude of cases that might be adduced. If the parties in this case had gone into equity, and that court had directed an issue to be tried, they might have modified it in any way they thought proper. One of the rules of a court of equity is, that they cannot decree against the oath of the party himself, on the evidence of one witness alone, without other circumstances; but when

the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial, so that they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself should be examined; and when the issue comes from a court of equity with any of these directions, the courts of law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained, without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act, than to leave it to the judges of the law to relax those certain and established rules by which they are sworn to decide."

If, indeed, there had been no courts of equity—or further, if they had been guided by less skill, caution, and vigilance, than have been displayed by its administrators—we should have had by this time little or no LAW—at least of our common law: a great portion of which is based upon a state of things gone by for ever, and is, consequently, utterly inadequate to the exigencies of modern times. Its prudent professors, observing this truth, have, as we have seen, taken, so to speak, a leaf out of the book of equity.

Society would not, indeed, tolerate the maintenance, in their original strictness, of the rules of law: which must, consequently, have long ago given way, one by one—as very many of them have already—before the power of the legislature. "Those who would lead," says Burke, "should know how to follow;" and it may be said that in this sense equity has, by following, led the law on towards its present state of dignity, power, and utility, in advancing the interests of society, and attaining the ends of justice.

Before quitting this topic, let us, at some risk of repetition, request the student to bear in mind, that he must notwithstanding what has gone before, act upon the maxim, that "Equity follows the law," with caution. He must not imagine it to be of universal truth; it being, on the contrary, like most other general rules, subject to many exceptions. As it cannot be generally affirmed, on the one hand, that where there is, in a given case, no remedy at law, there is none in equity; so, on the other hand, very much less ground is there for asserting that equity, in the administration of its own principles, is utterly regardless of the rules of law.* "When this court," said that eminent Chancellor, Lord Hardwicke,† "finds the rules of law right, it will follow them; but then it will likewise go beyond them." The doctrine thus tersely expressed, affords a clue to the tripartite division of the jurisdiction of equity with relation to law, viz. Auxiliary, Concurrent, and Exclusive, which will be presently explained.

Thus much for the maxim that equity "follows," instead of opposes, the law. Let us now very briefly dispose of the erroneous representations of Selden, Lord Kames, and Bentham, as to the *capricious and arbitrary mode of the interference of equity*: that it disregards the light afforded by *precedent*, and looks solely to the circumstances of any particular case. This also is a notion utterly unfounded—at least as far as concerns the modern system of equity. "If, indeed," (says the same enlightened American Jurist from whom we have already quoted), "a Court of Equity in England *did* possess the unbounded jurisdiction which has been generally ascribed it, of correcting, controlling,

* Kemp v. Pryor, 7 Ves. 249—50.

† Paget v. Gee, Ambler, 810.

moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised." * And so our own illustrious commentator: "If a court of equity were still at sea, and floated upon the occasional opinion which the judge, who happened to preside, might entertain of conscience, in every particular case, the inconvenience which would arise from this uncertainty, would be a worse evil than could follow from rules too strict and inflexible. Its power would have become too arbitrary to be endured in a country like this—which boasts of being governed in all respects by LAW, and not by WILL."† To refute the misrepresentations referred to, we shall content ourselves with citing the testimony of three eminent authorities,—Blackstone, Lord Redesdale, and Lord Eldon.

I. MR. JUSTICE BLACKSTONE.‡ "It has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the particular circumstances of every particular case. Whereas the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart, even although the reason of some of them may perhaps be liable to objection" * * "from the reverence very properly shown to a series of former determinations; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a

* 1 Eq. Jur. p. 17.

† 3 Bla. Comm. p. 441.

‡ 3 Bla. Comm. p. 432.

particular judgment founded on special circumstances, gives rise to a general rule."

II. LORD REDESDALE.* "There are certain principles on which Courts of Equity act, which are very well settled. The *cases* which occur, are various; but they are decided on *fixed principles*. *Courts of Equity have, in this respect, no more discretionary power, than the Courts of Law*. They decide new cases, as they arise, by the principles on which former cases have been decided, and may thus illustrate and enlarge the operation of those principles: but the principles are as fixed and certain, as the principles on which the Courts of Common Law proceed."

III. LORD ELDON.† "The doctrines of this Court ought to be as well settled, and made as uniform, almost, as those of the Common Law; laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain in quitting this place, than the reflection that I had done anything to justify the reproach, that the equity of this Court varies like the chancellor's foot."‡

The result of this mode of administering equity, has

* In *Bond v. Hopkins*, 1 Scho. & Lefr. 428—9.

† In *Jee v. Pritchard*, 2 Swanst. p. 414.

‡ This is an allusion to the following passage in the work entitled 'Table-Talk,' which has been attributed, but perhaps erroneously, to Selden:—"For law we have a measure, and know what to trust to. *Equity* is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure of the Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot: another a short foot: a third an indifferent foot. It is the same thing with the Chancellor's conscience."—*Table-Talk*, Tit. "Equity."

been to make the two systems of jurisprudence, Law and Equity, "equally artificial, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors."*

Both Courts recognise, and are bound by the Statute and Common Law. Where a rule of either the Statute, or Common Law, is direct, and governs the case, with all its circumstances, or the particular point, a Court of Equity is as much bound by it, as a Court of Law, and can as little justify a departure from it. If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation.† It will, as the case may admit and require, be guided by light derived from any safe and proper quarter: from the law of nations—the feudal law—the civil law—the *lex mercatoria*—the ecclesiastical law—and foreign law (in cases involving it). "Could there, indeed," continues the commentator "be a greater solecism than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject matter, there should exist, in a single instance, two different rules of property, clashing with or contradicting each other?"‡ And again, the same great authority correctly assures us,

* 3 Bla. Comm. p. 434.

† *Kemp v. Price*, 7 Ves. 249—251; Bacon's Abridg. 'Court of Chancery,' C.—Note. There are certain exceptions to this rule.

‡ 3 Bla. Comm. p. 441.

that the structure of jurisprudence which prevails in our Courts of Equity, is inwardly bottomed upon the same substantial foundations as the legal system, however different they may appear in their outward form, from the different tastes of their architects." * * * * "There is not a single rule of interpreting laws, whether equitably or strictly, which is not equally used by the Judges in the Courts both of Law and Equity: the construction must be, in both, the same; or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question: neither can enlarge, diminish, or alter that sense in a single tittle." † It was doubtless a hasty glance at this close correspondence between the two systems, which led a writer on Scotch law into the following misconception of the true position of the two:—"It may be said that *the ancient distinction between law and equity, as administered in England, no longer exists*; but that JUSTICE, whether under the name of law or equity, is dispensed, not according to arbitrary or fluctuating rules, depending upon the conscience or discretion of any individual, but under an artificial system of great perfection, in which the principles of rational and enlightened jurisprudence are brought into full and efficient operation, in a manner eminently calculated to give stability and permanence to the law of England." ‡ A question may here reasonably occur to the student—if there be this complete identity of object, and very nearly of means, between law and equity—why are they administered severally—in distinct courts? Suffice it here to observe, that this is a mixed question of public policy, and private convenience; and can never

* 3 Comm. p. 437.

† *Id. ib.* p. 431.

‡ Bell's (W.) Dict. and Digest of the Law of Scotland, p. 361.

be susceptible of any universal solution applicable to all nations, times, and changes in jurisprudence. The union of law and equity in the same Court, which might be well adapted to one country, or to one age, might be wholly unfit for another country, or another age.* In Rome, not only were different jurisdictions entrusted to different magistrates, *but the very distinction between law and equity was clearly recognised*—between *actiones civiles* (actions at law), and *actiones prætorie* (actions in equity).† These fell within the province of the *same* Prætors: so that Blackstone appears correct in stating, that the distinction between law and equity, as administered in different courts, was not, in his time, known, nor seemed to have been known, in any other country, at any time.‡ Lord Bacon was decidedly in favour of such a distinction, as wise and convenient. “All nations,” says he, “have equity: but some have law and equity mixed in the same court, which is worse; and some have it distinguished in several courts, which is better.” § Lord Hardwicke was of the same opinion; || and the tendency of modern times is manifestly towards the separate administration of different portions of judicial jurisdiction; and we may safely conclude with Mr. Justice Story, “that there is nothing incongruous, much less absurd, in such separation—or in denying to one court the power of

* 1 Stor. Eq. Jur. § 36.

† Parkes' Hist. Chanc. p. 38; Butler's Horæ Subsec. [43] p. 66; 1 Col. Jurid. 25; Pothier Pand. L. I. tit. 2, 10, 11, 14, 20; Taylor's Elements of Civil Law, 211—216; 3 Bla. Comm. 50.

‡ 3 Bla. Comm. 50.

§ Bac. Jurisd. of the Marches. Vide quoque, *De Augm. Scient.* l. viii. c. 3. app. 45.

|| Parkes' Hist. Chanc. App. pp. 504—5.

disposing of all the merits of a case, when its forms of proceeding are ill adapted to afford complete relief, and giving jurisdiction over the same case to another court better adapted to do entire justice, by its larger and more expansive authority.* In Scotland, which proceeds according to the method of the civil law, the supreme civil court of the country (the Court of Session), combines in itself all the functions of the English Courts, both of Law and Equity—"abating the rigour of the law, and giving aid when no remedy can be had in a court of law," "this equitable power being called the *nobile officium* of the court—a term derived from the civil law;" and it is "governed by well-defined principles, and with all the regard usually had, in Scotland, to precedent."† The equity jurisprudence exercised in America, is founded upon, co-extensive with, and in most respects conformable to, that of this country: approaching nearer to it even than their common law courts approach to ours.‡ In some of the States the administration of law and equity is blended in the same court; but in nearly all those which recognise equity jurisprudence, it is, as in England, administered in courts separate from those of law. §

We shall quit this part of the subject by observing, that lest the student should draw erroneous conclusions from certain expressions in the foregoing pages, in which *law* is represented as being, when contradistinguished from equity, of a rigid, inflexible character, and very limited in its sphere of action, it is necessary, in addition to what has already been said, to explain, that courts of law are

* Stor. Eq. Jur. ch. I. § 37.

† Bell's Dict. and Dig. of the Law of Scotland, pp. 361—2.

‡ Stor. Eq. Jur. ch. I. § 58.

§ *Id. ib.*

also armed with analogous discretionary powers of an extensive and effectual kind. We shall here mention only two. The most potent weapons of a Court of Equity, are its powers of INJUNCTION, and of COMPELLING SPECIFIC PERFORMANCE of contracts and other matters. 1. A writ of *injunction* (the *interdict* of the Roman law)* is a judicial process in equity, by which a party is required to do, or refrain from doing, a particular thing: and the object of this writ is generally *preventive*, and *protective*, and sometimes *restorative*. This may be called the right arm of equity—its power is almost unlimited and irresistible; though it was not established (especially when used to stay suits and judgments in the Courts of Law) till the reign of James I., and only after a long and desperate struggle against it by the Common Lawyers.† So complacently acquiescent, however, have Courts of Law now become in the exercise of this once dreaded and detested interference, that they will lend no aid whatever to parties seeking to evade it: though Sir James Mansfield, when Chief Justice of the Common Pleas, in 1809,‡ declared it “desirable to take some step to check the growing practice of seeking for injunctions in that Court against proceeding to trial at law.” The question in the case alluded to was, whether the Court would take a cause out of its turn, for the purpose of anticipating an apprehended Injunction. The present Lord Campbell (then Mr. Campbell, the author of the *Nisi Prius* Reports passing under his name) was, rather oddly,

* Halifax, *Roman Civil Law*, ch. vi. p. 102.

† 3 Wood's Lect., Lect. 56, p. 398. 1 Chanc. Rep. App.; Eden on Injunct. c. 3, p. 135.

‡ Goldschmidt v. Marryatt, 1 Camp. 559, note. In this case the Chief Justice expressed his strong suspicion that the Bill for an Injunction ‘was meant for delay only.’

‘deputed’ (instead of the modern practice being resorted to, of the Judge quitting the court to consult any of his brethren) ‘to go as *amicus curiæ*, to the Court of King’s Bench, and inquire what was the practice there.’ On his return he certified, “that Lord Mansfield had laid it down as a rule, ‘that although he would not *wait* for any proceedings in equity, he would on no account take a cause out of its course *for the purpose of defeating them*’; and that the said rule had been observed by his two noble and learned successors, Lord Kenyon and Lord Ellenborough”—the latter of whom was Chief Justice when the learned *amicus curiæ* went upon his journey of discovery to the King’s Bench. To return, however. Courts of Law exercise powers closely analogous to these of Equity, though to a much more limited extent. Some of them—as to prevent *nuisance* and *waste* *—were quite inadequate to meet the cases to which they were applied; and had, long before the statute of 3 & 4 Will. IV. c. 27, s. 36, fallen into disuse, on account of the incomparably superior preventive powers of equity. Still, however, the Courts of Law have an extensive authority, exercised on equitable principles, and of a summary character, to prevent their process and authority from being abused and perverted, so as to occasion hardship and injustice; as was instanced in the recent case of *Cocker v. Tempest*, 7 M. & W. 502. The Court of Exchequer there exercised “its equitable power” to *stay an action brought against good faith*. “The distinction,” said Alderson, B. “between this power—one to be used with the most careful discretion—and that exercised by the Court of Equity in granting an injunction,

* See the case of *Jefferson v. Bishop of Durham*, 1 Bos & Pull, pp. 105 *et seq.*

is—that the latter stops proceedings in another Court; the former only in the Court in which the proceedings are.” The Courts at Westminster are, in fact, in the daily exercise of a very extensive and salutary discretion; relieving suitors from the oppressive strictness of technical rules, unless they have been negligent and late in applying for such relief, or it would impose hardship on their opponents. The courts can set aside warrants of attorney, and other securities, judgments, and executions, and indeed all sorts of formally *regular* proceedings, if against good faith. They have complete authority over all persons within their jurisdiction, to enforce good conduct. The legislature has also, from time to time, armed them with summary and equitable jurisdiction in many important cases: as in Arbitrations (statutes 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. c. 42); Annuity Deeds (53 Geo. III. c. 114); Mortgage Deeds (7 Geo. II. c. 20—*ante*, p. 299); and Replevin Bonds (11 Geo. II. c. 19, s. 23). There is, indeed, no limit to their power over these important instruments: for the statutes direct, “*that they may give such relief as seems to them agreeable to justice and reason.*” In one case, indeed, the Legislature has recently extended to the Common Law Courts a most important section of purely equitable jurisdiction—viz. in questions of INTERPLEADER. Till the passing of statute 1 Will. IV. c. 58, in 1831, the Common Law was able to deal with cases of this description in such a feeble and imperfect manner, as necessarily led to the rapid growth of this species of equity jurisdiction, exercised by means of a Bill of Interpleader. The statute in question has given a far more expanded reach to the remedy of Interpleader in the Courts of Law, and extended its benefit to numerous cases of *bond fide* doubt and difficulty,

securing therein at once such a cheap, expeditious, and economical administration of justice, as has greatly added to the business of the Courts of Law. II. The exercise of the power of *compelling specific performance*, by the Court of Equity, can be distinctly traced back to the year 1468 (i. e. 8 Edw. III.) * The ground of this jurisdiction is, that a Court of Law is unable to grant specific performance, and can relieve the injured party by giving him only compensation in damages; which may very often afford no real redress whatever for the injury complained of. This is the true basis of this branch of Equity jurisdiction,† which, however, does not generally extend to contracts for the sale of stock and goods;—for in such cases *damages* afford a complete remedy to the purchaser. The Court of Queen's Bench wields a weapon quite as potent, called a *MANDAMUS*; a high prerogative writ which has been said to be “peculiar to that Court, and one of the flowers of it.” ‡ This writ affords a proper remedy in cases where there is a specific legal right, and no specific legal remedy; and is available where the party has not any other means of compelling, in such cases, specific performance. The only proper ground of it is, the defect of justice.§ The distinction between this writ, and that of Equity commanding specific performance, is, that it is used *principally* for public purposes—to enforce performance of public rights and duties; but it also operates most powerfully and extensively in affording specific relief, and enforcing many *private* rights, when withheld by a public officer.||

* Madd. Chanc. Prac. 287. † Adderley v. Dixon, 1 Sim. & Stu. 607.

‡ *Awdeley v. Joye*, Popham, 176. § Selw. Nisi Pr. 1093, 19th ed.

|| 1 Chitt. Gen. Pr. 790 (2d ed.).

The Court of Queen's Bench, and in some cases the Courts of Common Pleas and Exchequer, have a very extensive jurisdiction by PROHIBITION, to restrain all other Courts, from—it has been said—the very highest * to the lowest, from proceeding in a matter over which they have either no jurisdiction, or, having jurisdiction, have attempted to proceed according to rules differing from those which ought to be observed; and also where an inferior Court's proper exercise of its jurisdiction would lead to the defeat of a legal right. The exercise of this power was long desperately resisted, but ineffectually, by the Ecclesiastical Courts. See 3 Bla. Com. 113. Either the Court of Exchequer or Queen's Bench (*Exp. Smyth*, 2 C. M. & R. 748; *Exp. Smyth*, 3 Ad. & Ell. 719; *Chesterton v. Farlar*, 7 A. & E. 713,) may issue a Prohibition even to the Judicial Committee of the Privy Council, if they act contrary to the general law of the land, or exceed their jurisdiction. *N. B.*—All these three cases were Appeals from the Ecclesiastical Courts to the Judicial Committee of the Privy Council. Whether or not a Prohibition could be issued against the Lord Chancellor, if he should inadvertently exceed his jurisdiction, seems a difficult and unsettled question. See *Davy's Case*, 1 Lord Raym. 531, per Holt, C. J. The attempt was made in the year 1819; but the circumstances of the case rendered it unnecessary to decide the main question. "We wish not to be understood," said Lord Tenterden, "as giving any sanction to the supposed authority of this Court to direct a Prohibition to the Lord Chancellor, sitting in Bankruptcy: we do not decide *against* the existence of

* See *Tibbets v. George*, 5 Ad. & Ell. 107; *Noy v. Reynolds*, 1 Ad. & Ell. 162.

such authority, because we have not heard the question fully argued. If the question ever arise, the Court whose assistance may be invoked to correct an excess of jurisdiction in another, will take care not to exceed its own." *Exp. Cowan*, 3 B. & Alderson, 130. To proceed, however. This is a power very closely resembling that of *Injunction* by a Court of Equity; for it may also be extended, in the discretion of the Court, to other cases than those above mentioned, namely, to prevent the committing of a public irremediable injury. It has been well suggested, that as *prevention* is better than punishment, the exercise of this high prerogative jurisdiction can hardly be too much extended: and that if a single judge of a Court of Equity, may issue an injunction of the most formidable character, in cases of the greatest magnitude, there seems no reason why four Judges in a Court of Law should not exercise such a salutary jurisdiction—one which is unquestionably vested in them.* The power of Courts of Equity by Bill of Injunction and of Specific Performance, might, by the just application, at law, of the inherent energies of *Mandamus* and *Prohibition*, secure a far more speedy, complete and comprehensive administration of justice by the Common Law Courts, than they have hitherto attempted.†

Having thus endeavoured to point out some analogies between the power exercised by Courts of Law, and of Equity, with reference to their compelling parties to do that which they ought to do, or abstain from doing what they ought not, we will proceed briefly to indicate two

* 2 Chitt. Gen. Pr. 359.

† The student will see an interesting application of the Writ of *Prohibition* (the proceedings in which, and in *Mandamus*, have been recently (1831) much improved by stat. 1 & 2 Will. IV. c. 21) in the late case of *Hallack v. The University of Cambridge*, 1 Q. B. 593.

other points of resemblance in respect of object, and the machinery for effecting it.

We distinguish our remedies for wrongs, or for the enforcement of rights, into two classes—those administered in Courts of *Law*, and those in Courts of *Equity*: the rights secured by the former are termed *legal* rights; those secured by the latter, *equitable* rights. Now the Courts of Law proceed, generally, by *certain prescribed forms*, and give a *general judgment* for or against the defendant: entertaining jurisdiction, generally speaking, only in certain ‘actions,’ and giving remedies according to the exigencies of such actions. There are, however, very many cases in which a simple judgment for either party—“that he *do recover* [*quod recuperet*] his debt, or damages, or costs”—without qualifications and conditions, and particular arrangements, will not do entire justice, *ex æquo et bono*, to either party. Some *modifications* of the rights of both parties, or either party, may be essentially requisite: some *restraints* on one side or the other: and certain peculiar adjustments, either present or future, either temporary or perpetual. Now, generally speaking, Courts of Law have no methods of proceeding to accomplish such objects: their forms of action and of judgments are not adapted to them; the proper remedy cannot be found, or, at all events, administered to the full extent of the relative rights of the parties. Hence is manifest the vast advantage derivable from the existence of a co-ordinate jurisdiction to supply the deficiencies of the law, and contemplate and provide for cases out of its reach; a jurisdiction of—so to speak—such an elastic and expansive character as scarce any conceivable cunning, fraud, or difficulty can evade or resist.—In one word, Equity stands ready with its power-

ful assistance in all cases where a *plain, adequate, and complete* remedy cannot be afforded by the Law. But lest the student should form an exaggerated notion of the extent to which the law stands in need of such assistance and interference, we will mention the case of FRAUD, and of an ACTION FOR MONEY HAD AND RECEIVED. (I). Many persons suppose that the Law is incompetent to deal effectually with case of fraud: but that is a very gross mistake. Law and Equity have here a *concurrent* jurisdiction, and there is scarcely a single kind of fraud, however intricate and tangled its tissue, which cannot be completely unravelled in a Court of Law. Fraud, deceit, and imposture will not only afford a legal defence against all sorts of actions and proceedings at law; but will afford a *right of action* to recover substantial damages by means of an Action on the Case against the perpetrators of it. The Courts also are continually dealing with cases of fraud, when connected with or arising out of legal proceedings, in a summary manner, and on affidavits.—(II). The action for MONEY HAD AND RECEIVED is perhaps the most frequent in use of any of the forms of action, and extends to the recovery of money under an endless variety of circumstances. Its structure is exceedingly simple—extending to some half dozen lines only. The plaintiff alleges that the defendant “is indebted to him in *so much* for money had and received by the defendant to the use of the plaintiff; and thereupon promised the plaintiff to pay it to him.” This the defendant simply denies:* and with

* The technical form of Plea “Non Assumpsit” [i. e. “That the defendant *did not promise* in manner and form as alleged by the plaintiff] puts in issue, “not only the receipt, by the defendant, of the money claimed by the plaintiff, but also *the existence of all those facts* which make his receipt of it a receipt to the use of the plaintiff.” This is one of the late new Pleading Rules: Reg. Gen. Hil. T. 4 Wil. IV.

this slender machinery may be recovered any sum of money, however large, which, *ex æquo et bono*, the defendant ought to refund; and Lord Mansfield thus, in *Moses v. Macfarlane*, 2 Burr. 1012,* enumerated some of the cases to which it was applicable. "This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex æquo et bono*, the defendant ought to refund.† It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as, for instance, in payment of a debt barred by the Statute of Limitations; or contracted during his infancy; or to the extent of principal and *legal* interest upon an usurious contract;‡ or for money *fairly* lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under

* See a qualification of one of the broad propositions of Lord Mansfield by Lord Alvanley, C. J., in *Johnson v. Johnson*, 3 Bos. & Pull. 169.

† See *Tibbets v. George*, 5 Ad. & Ell. 107; *Noy v. Reynolds*, 1 Ad. & Ell. 162.

‡ The student will observe, that the lender of money on usurious terms cannot, by any action at law, recover back even the principal money advanced (See *Hargreaves v. Hutchinson*, 2 Ad. & Ell. 12); nor prove for it against the estate of the bankrupt borrower. *Exp. Scrivener*, 3 Ves. & B. 14; *Benfield v. Solomons*, 9 Ves. jun. 84; *Exp. Campbell*, 2 Rose, 51. If, however, the borrower apply for relief to a Court of *Equity*, it will first require him to pay the lender what is *bonâ fide* due to him. See *post*, p. 324.

those circumstances. In one word, the *gist* of this kind of action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money.—One great benefit which arises to suitors from the nature of the action is, that the plaintiff need not state the *special circumstances* on which he founds his claim: and it is equally beneficial to the defendant. It is the most favourable way in which he can be sued. He can be liable no further than the money which he has received—and against *that*, may go into any equitable defence, on the general issue: may claim every equitable allowance: in short, may defend himself by anything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand or to any part of it.” What is this, in effect, but a very cheap, convenient, comprehensive, and effectual Bill in Equity? Without staying to explain the nature of that great class of actions entitled *actions on the case*, which so long ago as the reign of Edward I. were devised expressly to meet cases from time to time requiring remedies not afforded by the other known forms of action, and in applying which to the most novel and difficult cases, the courts of law are ‘guided by the most liberal equity;’* let us ask whether what has been thus briefly and imperfectly explained, does not afford evidence of what has been already suggested, namely, the beneficial effect upon the common law with which the modern enlightened administration of equity has been attended,—gradually mitigating its originally harsh and rigid character, expanding its power, extending its limited sphere of action, opening and liberalising the views of its

* 3 Bla. Com. 436.

professors, and, in short, moulding our ancient common law into a system adapted to modern and greatly altered times, habits, manners, and exigencies?—This is the only true view of EQUITY, as administered in England; and it justifies the conclusion of the Commentator, that “in its true and genuine meaning, Equity is the SOUL AND SPIRIT OF ALL LAWS.—*Positive* law is construed, and *rational* law is made by it:—in this, equity is synonymous with *justice*: in that, with the true sense and sound interpretation of the rule.”* Thus comes it to pass, that law and equity are equally the handmaidens of JUSTICE—trained somewhat differently—with distinct provinces, duties, and authorities assigned to them, but all with a view to one common object. Nothing would be more unseemly, dangerous, and in some points of view even ridiculous, than jealousy and disunion between the two. “The rules of *property*, rules of *evidence*, and rules of *interpretation* in both courts, are, or should be, exactly the same: both ought to adopt the best—or must cease to be courts of justice.”† “And such,” proceeds the Commentator elsewhere, “being the parity of law and reason which governs both species of courts, wherein does their essential difference consist? It principally consists in the different modes of *administering justice in each*—in the mode of *proof*, the mode of *trial*, and the mode of *relief*.”‡—Let us now, however, proceed to give a brief practical description of the province of equity: previous to which, we must premise that there are five grand maxims which govern the administration of equity; and will afford the student *reflecting* upon them, and possessed of some

* 3 Bla. Com. 429.

† Id. p. 434.

‡ Id. p. 436.

knowledge of *law*, an insight into much of the system of equity.

I. *Equity follows the law*—especially acting by analogy to its rules, in relation to equitable titles and estates. This maxim has received sufficient illustration in the preceding pages.

II. *Where there is equal equity, the law must prevail.* By this is meant, that in such a case the defendant has as much claim to the *protection* of a Court of Equity for his title, as the plaintiff has to the *assistance* of the court to assert his title; equity in such cases will not interfere in behalf of either party: its maxim being, *in æquali jure melior est conditio possidentis*.

III. *He who seeks equity, must do equity.* Thus, if an heir seek to recover his title deeds which are in the possession of a jointress, Equity will not assist him, except on the terms of his confirming her jointure; and if a debtor ask Equity to set aside an usurious contract (*antè*, p. 321), she will first insist on his paying the lender what is really and *bond fide* due to him.

IV. *Equality is equity*—or, as it is otherwise expressed, “Equity delighteth in equality.” This maxim governs several extensive classes of cases: such as that of *contribution* between co-contractors, sureties, and others: the proportional abatement of legacies, when there is a deficiency of assets; and the marshalling and distribution of equitable assets. This last case may be regarded as an exception to the first maxim: for whereas, at law, debts must be paid out of assets in the order of their dignity (e.g. a *specialty* before a simple contract debt), Equity deems all debts to be of the same nature—in *pari jure*—and therefore payable proportionally, without regarding priority of right at law.

V. *What ought to have been done, or was agreed to have been done, Equity looks upon as done.* That is to say—Equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed *exactly as they ought* to have been done, not as the parties *might* have executed them. But Equity will not thus consider things in favour of *all* persons, but of such only as have a *right* to pray that the acts may be done. This is a very important and often difficult rule to be applied in practice. A simple illustration of it is the case of money covenanted, or devised, to be laid out in *land*: Equity treats this money as land, which descends to the *heir*: and *à converso*, land contracted or devised to be sold, Equity treats as *money*.—The student will remember that all these maxims are subject to important exceptions and limitations, which nothing but a thorough study of Equity can enable him to discover or appreciate. The second one, for instance, i. e. *in æquali jure melior est conditio possidentis*, is subject to the operation of another rule, viz. *Qui prior est tempore potior est jure*.

The jurisdiction of Equity, with reference to that of Law, is *concurrent*; or *auxiliary*; or *exclusive*.

I. The CONCURRENT jurisdiction has its true origin in the incapacity of the courts of law, though they have general jurisdiction in the matter, to give adequate, specific, and perfect relief to its suitors. In a great variety of cases, a simple JUDGMENT *for the plaintiff*, or *the defendant*, does not meet the full merits and exigencies of the case, but numerous adjustments, limitations, and cross claims are to be introduced and finally acted upon; and a DECREE, meeting all the circumstances of the

particular case between the parties, is indispensable to the attainment of complete distributive justice. "In administering relief," said the Chancery Commissioners,* "the court of chancery has frequently to unravel a long chain of fraud, and by a comprehensive decree to counteract the unjust consequences which have arisen or may arise from it: to investigate accounts, frequently complicated, between persons who employ all their art to perplex and resist; to enforce agreements for the conveyance or transfer of property in which many persons are interested, and long examinations of title necessary; to compel the correction of mistakes by which rights have been acquired according to the strict letter of the common law, but contrary to justice; to administer a large property encumbered with debts, and involved in various difficulties, and to draw out a surplus to be distributed according to the complicated rights of creditors and various other claimants."—It is impossible not to admire the flexibility of courts of equity in dealing with such arduous cases, and adapting their decrees at once, in the most exact and comprehensive manner, to the actual relief required by the parties. In this respect, the *decree* of a court of equity stands in remarkable contrast to the *judgment* of a court of law: which however, in a vast number of applications to its summary jurisdiction, makes rules and orders very similar to the decrees and orders of courts of equity. To illustrate this subject, we shall present to the student the form of a general judgment at law, and of the decree of a court of equity.

Here is a *judgment*, in an action at law, in favour of the *plaintiff*:—"Therefore it is considered that the said AB do

* Chanc. Comm. Rep. p. 9.

recover against the said CD his said debt, and his damages, together with his costs and charges by the jury assessed, and by the court here adjudged; and the defendant in mercy," &c. For a *defendant* it is simply—"Therefore it is considered that the plaintiff take nothing by his said writ, but that he in mercy,* &c., that the defendant do go thereof without day, &c. And do recover his costs," &c. The *decrees* of courts of equity are often necessarily of a voluminous and complicated character, "ordering" a very great number of things, minutely specified, to be done by the different parties. On, or sometimes after the hearing of a cause, the court pronounces its decision—a *minute* of which is taken down as uttered by the proper officers, and by counsel, and afterwards drawn up finally in form. The following is a sample of a very ordinary and simple one; directing stock to be considered [see *antè*, p. 324, 5, as to a court of equity, treating that as *done*, which ought to be done] as *having been sold from the time of the testator's death*.

"Order £85,456 Annuities, part of the personal estate, to be sold, and the money arising from such sale to be invested in the £3 per cent. Bank Annuities, in the name of the Accountant-General, in trust in this cause; and *declare* that the said Annuities ought to be considered as having been sold and turned into 3 per cent. Bank Annuities from the death of the testator; and *declare*, that the amount of the dividends which would have accrued due on such £3 per cent. Bank Annuities, if so purchased as aforesaid, from the death of the said testator up to the present

* *i. e.* amerced or *fined*. Q. from ἀμερδω-σθαι—'to deprive!' Thus used by Milton—

'Millions of spirits for his fault amerced
Of heaven,' &c.

time, ought to be taken as annual produce, in computing what is due to A. B., one of the Defendants in this cause named, on account of his life-interest in the residue of the said testator's personal estate and effects; and *declare* the said A. B. entitled to the clear produce of the said testator's personal estate, for his life; and *refer* it to the Master to ascertain the amount of such residue: and for that purpose *let* the Master compute what might, from the death of the said testator, have been received for dividends for so much of the said testator's personal estate as was standing in the £3 per cent. Consols, at the death of the said testator, and for the dividends of so much thereof as was in any other public stocks or funds, in case such last-mentioned stocks or funds had been turned into £3 per cent. Bank Annuities. And *declare* that the said A. B. is entitled to receive what shall be found due on such several accounts, and direct the same to be paid to him. And *let it be referred* to the Master to tax all parties their costs, to be paid out of the funds in Court. And *let the Master inquire* whether C. D., one of the Executors, has been put to any expenses in the transfer of stock, or otherwise attending the execution of the said trust, which have not been allowed him, and let the Master allow the same accordingly, and let the same be paid to the said C. D. out of," &c. &c.

In short, as intimated in a former page,* the jurisdiction of Equity extends to all cases of legal rights, where there is not, under the circumstances, a *plain, adequate, and complete* remedy at law.† This branch of Equity jurisdiction is that which is of the greatest extent, and most familiar occurrence, in practice. In some of the cases subject to

* *Ante*, pp. 319, 320.

† Comyn's Dig. tit. 'Chancery,' 3 F. 9.

it, courts of law formerly refused *all* redress, but will now grant it: Equity will not, however, on that account, *now* relinquish her right of interference. The most common exercise of this species of jurisdiction is in cases of Account, Accident and Mistake, and Fraud. The second and third heads are scarcely distinguishable from each other; but we shall here speak of them separately, in deference to the usual arrangement to be found in books of Equity. The student's attention is invited to the brief account of these matters which is here attempted, as calculated to afford him an interesting illustration of the spirit which actuates a Court of Equity, and of the precise nature of its co-operation with a court of law.

I. ACCOUNT.—One of the most ancient forms of action of the common law, which at the present day affords generally the most extensive and operative remedies at law between parties, is that of ACCOUNT: but, in spite of the assistance which, from time to time, was afforded to it by the legislature, its proceedings were so dilatory and inefficient, that it rapidly declined as soon as Equity had exhibited its superior capacity in dealing with matters of account, however complicated and extensive, between mortgagee and mortgager, principal and agent, partners, merchants, and others. Still, however, very intricate and difficult matters of account are daily the subject of investigation in courts of law, by means of actions of Debt, and Assumpsit, and of Account—for this last action is by no means obsolete. There are several at this moment pending in the different courts;* and two recent decisions (*Inglis v. Haigh*, 8 M. &

* See one discussed on a demurrer in the Court of Exchequer in Trinity Term last [1844], *Sturton v. Richardson*, 2 Dowl. & L. 182: and another (*Pryor v. Pettingall*), 12 Law J. Rep. N.S. Exch. 219. The student will see a full explanation of the proceedings in this action in the case of *Godfrey v. Saunders*, 3 Wils. 73.

W. 769: *Cottam v. Partridge*, 4 Man. & Gr. 271,) upon the exception of merchants' accounts from the Statute of Limitations, may possibly have the effect of bringing this dormant form of action into more frequent use. The way in which, however, the more important matters of account are practically dealt with at law, is by referring them to arbitration, either after the cause has gone to trial, or before going to trial, by a Judge's order. Arbitrations are generally held in the evening at chambers, and constitute a very important proportion of the practice of the junior Bar. The arbitrator, almost invariably a barrister, has power given him to examine both parties on oath; to compel the production of all necessary papers and documents; complete discretion as to costs, and the final adjustment of the dispute—but only between the parties to the reference. In a Court of Equity these functions are exercised by a Master, acting as Auditor, and who is armed with much more extensive powers than common-law arbitrators. There can, in short, be no doubt that the whole machinery of Equity is far better adapted than that of law, to deal satisfactorily with long, cross, and intricate accounts.

II. ACCIDENT.—The jurisdiction of Equity in these cases is probably coeval with its existence. It is not very easy to define what is the sort of "accident" here spoken of; but it may be stated generally that the principles of Equity jurisdiction in cases of Accident, appear to resolve themselves into the following: that the party seeking relief must have a *clear right*, which cannot be otherwise enforced in a suitable manner: or that he will be subjected to an unjustifiable loss, without having been guilty of any misconduct, or liable to any blame whatever: or that he has a *superior Equity* to the party from whom he seeks relief.

Thus, if a testator be prevented by accident from making a will in favour of those to whom he had intended to leave his property, Equity will not interfere in their behalf; for they have no independent right, until there is a title consummated at law, but depend solely on the testator's bounty. Again, Equity will not relieve against an accident occasioned by the applicant's own fault or negligence; nor give effect to an imperfect will against an innocent heir-at-law: nor, finally, interfere in favour of parties who have been prevented by accident from fulfilling matters which they had *expressly agreed* and bound themselves to fulfil: for it was their own folly to have made such absolute stipulations; and they might have provided against the contingencies complained of. But Equity will interfere to remedy defective executions of powers, provided the defects are not of the very essence and substance of the power. Thus the want of a seal, or of witnesses, or of a signature, will be aided in Equity. And Equity has also regard in such cases to the position, character, and circumstances of the applicant; interferes in favour of purchasers, creditors, wives, children, and lunatics, when it would not so interfere in favour of the donee of a power, or a husband, or grand-children, or remote relatives, or strangers generally. So Equity will decree payment of lost or mutilated bonds, and bills of exchange;* requiring, however, the security of the applicant's oath of the loss, and his giving a sufficient indemnity. Such are samples of the interference of *Equity* in cases of accident. But Courts of Law can also relieve effectually against very

* So by statute 9 & 10 Will. III. c. 17. § 3, if an *inland* bill be lost before it is due, another similar bill must be given, if the loser will give an indemnity against liability on the lost instrument.

many accidents—as “loss of deeds, mistakes in receipts, or accounts, the literal purpose of a condition rendered impossible by death, and a multitude of other contingencies.”* With reference to the first of the cases thus mentioned by Blackstone, viz., the loss of deeds, it may be interesting to the student to add one or two observations. In the year 1789, the Court of King’s Bench, in the case of *Reed v. Brookman*, 3 T. R. 151, decided, that if a deed had been *lost by time and accident*, that fact would excuse the party relying upon it, from making *profert* of it—i.e., from producing it; and he might allege such loss for that purpose upon the record, and avail himself of it as if it were in existence. The case is well worthy of being carefully studied, in order to appreciate the importance of the grave disapprobation of it expressed by Lord Eldon, C., in the year 1802, in the case of *Exp. Greenway*, 6 Vesey. J. 812, as tending to a mischievous confusion of the doctrines of law and equity. Notwithstanding, however, his high authority, the case has been, ever since it was decided, well established law; but, as observed by the learned editor of the last edition of Williams’ Saunders’ Reports, (vol. i. p. 9, a, note c, sixth edition—where will be found collected all the principal decisions upon the subject, both at law and in equity,)—the rule requiring *profert*, ought to be so relaxed, on grounds of extreme necessity only.

III. MISTAKE. There are two kinds of mistake, one in matters of law, the other, in matters of fact. The maxim *Ignorantia legis neminem excusat*, says Mr. Justice Story, “probably belongs to some of the earliest rudiments of English jurisprudence; and is certainly so old, as to have

* 3 Bla. Com. 431.

been long laid up among its settled elements.”* This learned person complains, perhaps with some justice,† of the loose and unsatisfactory manner in which the rule in question has been treated by our English elementary writers on Equity. It is, however, laid down by one of them, Mr. Fonblanque, as a general proposition, that in courts of equity, *ignorance of the law*, with a full knowledge of the facts, shall not affect agreements, nor excuse from the legal consequences of particular acts.‡ And Mr. Justice Story confirms the proposition; holding that the exceptions to it are few, and generally stand on some very urgent pressure of circumstances. “The court,” says that enlightened American jurist, Chancellor Kent, “does not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision, in any one given case on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences.”§ For such reasons it is submitted, that the statements to be found in various decisions of the courts, and in text-books, that Equity will relieve against mistakes of the law, should undoubtedly be received with very great caution. The true view of the case would seem to be the following: when there is a plain and established doctrine on the subject, so generally known,

* 1 Eq. Jur. pp. 97—8 (2d ed.).

† 2 Eq. Jur. 122 (note 2).

‡ 1 Fonb. Eq. b. 1. c. 2. § 7, note (v).

§ Lyon v. Richmond, 2 Johns., Ch. Rep. 60 (Amer.).

and of such constant occurrence, as to be understood by the community at large as a rule of property—such, for instance, as that the eldest son is heir to his father—there a mistake, in ignorance of the law, and of title founded on it, may well *give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused*. In such cases, the mistake of the law is not the foundation of the relief, but only *the medium of proof* to establish some other proper ground of relief. It may be therefore received as a rule, that Equity will not relieve *merely* on the ground of a mistake of the law ; but that rule is relaxed, or not rigidly insisted upon, in such cases as those just enumerated. “In America,” says Mr. Justice Story, “the general rule has been recognised as founded on sound wisdom and policy, and fit to be upheld with a steady confidence.*

The case of *a mistake of facts*, presents far less difficulty both at law and in equity. The general rule is, that an act done, or contract made, under a mistake or ignorance of *a material fact*, will not be acted upon in a court of equity. Every one is presumed to know the law ; but no one can be presumed acquainted with all matters of fact ; nor is it possible with any degree of diligence, in all cases, to acquire that knowledge. Ignorance of facts, therefore, imports no culpable negligence ; and affords an extensive ground for the benignant operation of equity ; which requires, however, the previous exertion, by the applicant for its assistance, of reasonable diligence and attention to his own interests ; otherwise, it would only be affording a premium upon negligence. *Vigilantibus non dormientibus jura subveniunt*. It is obvious, that the expression “ignorance of facts,” [which is generally used

* 1 Eq. Jur. pp. 122—23.

as equivalent to *mistake of facts*], is one requiring much explanation, in order to afford a correct view of the principles of equity applicable to such cases. It may be stated in a general way, that mistake or ignorance of facts, is a proper subject of relief, only when it constitutes a *material* ingredient in the contract of the parties, and disappoints their *intention* by a mutual error; or when it is inconsistent with good faith, and proceeds from a violation of the obligation imposed by law upon the conscience of either party. But when each is equally innocent, and there is no concealment of material facts *which the other party has a right to know*, and there has been no surprise, or imposition,—then the mistake, or ignorance, lays no foundation for equitable interference, and is regarded as strictly “*damnum absque injuria*.”* The most ordinary case for this kind of interposition on the part of equity, is that of a mistake made in written documents. It will grant relief in such cases, provided there be a *plain mistake, made out clearly, by satisfactory proofs*; and it signifies not whether the instrument be a mere preliminary one, or the formal and solemn one subsequently executed. Equity can reform either, by making it conformable to the original intentions of the parties. But how is that intention to be made known? By the aid of either written documents, or verbal evidence. In the latter case, courts of equity interfere with proper jealousy and reluctance. It is sufficient to suggest the possibility of its impolitic and dangerous conflict in such cases with the fundamental rule which prohibits the variation of written instruments by verbal evidence,—and also with the statute of Frauds. An important distinction exists between the case of an application to Equity to decree

* Jeremy on Eq. Jur. b. iii. part 2, p. 58.

specific performance of an agreement, and that of a party *resisting* such performance, with reference to the admissibility of verbal evidence. Equity is never *bound* to decree specific performance; and if an applicant for it says, in effect, that the agreement is defective, as not containing all, or other than, the intended terms, a court of equity will not allow the introduction of verbal evidence to vary, or add to, the written agreement. In the latter of the two cases above proposed, however, Equity will permit the introduction of such evidence, for the purpose of justifying his *resisting* the performance, on the ground that the agreement was not really that between the parties. There is an important distinction between English and American courts of equity, in this respect: the former will not permit parol evidence to vary and reform an agreement, and then decree specific performance of such varied and reformed agreement, "which would be virtually repealing the statute of Frauds;" * but in America, Chancellor Kent, after a most elaborate consideration of the subject, unhesitatingly rejected the distinction insisted upon by our courts, as unfounded in justice; and decreed performance accordingly.†

It is said, that Equity will "correct mistakes," made even in a will.‡ But it may be questioned whether such an expression is strictly accurate, and whether Equity really goes any further than to give a proper construction to the evident language of the will. The mistake spoken of must be apparent on the face of it, or made out by a due construction of its terms;—for the intention must be gathered

* See Mr. Baron Alderson's judgment, in the *Attorney-General v. Sitwell*, 1 Younge & Coll. 559, 582—3.

† *Gillespie v. Moore*, 2 Johns. Chanc. Rep. 585; and see 1 Stor. Eq. Jur. 143 (2d ed.).

‡ 1 Stor. Eq. Jur. p. 157.

from within the four corners of the will, and must *then* prevail over the words. The mistake or omission complained of must, in short, be perfectly clear, and demonstrable from the structure and scope of the will itself. If there be doubt, Equity refuses to interfere.*—We must pause, for a moment, to remark that nothing is more interesting than to observe the laudable anxiety displayed by courts both of Law and Equity, to steer evenly between the dangers of a total subversion of all certainty in the rules of law, on the one hand; and of permitting them, on the other, to defeat the plain and lawful intention of the parties framing written instruments. This is specially noticeable in the case of Wills. The anxiety of the courts *to discover and give effect to the real intentions of testators* has induced them to dispense with the observance of the technicalities required in deeds. There is, however, much force in the observations of Mr. Burton (Elem. Comp. of the Law of Real Property, § 283). “Reasonable as this indulgence may at first sight appear, the inconvenience which has ensued from it is far more extensive and important than the mischief which it was designed to prevent. The mischief of greater strictness would have been, that the right conferred by the Statute of Wills would be forfeited by ignorance, while the inaccuracies of the testator would have redounded to the benefit of his heir. The actual inconvenience has been the continual vexation of our judges of Law and Equity with nonsense, which they must interpret, and inconsistencies, which they must reconcile; the constant accumulation of precedents, which sometimes assist, and sometimes

* Holmes v. Custance, 12 Ves. 279.

hamper their endeavours ; and the uncertainties of right which no *private* learning or judgment can possibly decide. It must be owned, however, that no part of our legal system displays more ingenuity than that which relates to the interpretation of Wills."

Courts of Law, also, deal, to a considerable extent, very benignantly with *bonâ fide* error. They will not hold a party to a written receipt even, if he can prove that it was given under a mistake,* and that the money is really unpaid ; and though a bill of exchange or promissory note be expressed to have been given for *value received*, the defendant may nevertheless show, if he can, that he received no value at all, and gave it, for instance, merely by way of accommodation. So also is it with mistakes in accounts of agents and others, and many similar cases which might be mentioned. Though Courts of Law hold, that money, paid under a mistake of *law*, cannot be recovered back ;† two recent and very important decisions of the Court of Exchequer and Common Pleas, have afforded relief in cases of mistake, and forgetfulness of *facts*, to an extent greatly beyond any to which Courts of Law had previously gone. In *Kelly v. Solari*, 9 Mees. & Welsby, 54, the Court of Exchequer held, that money, paid to another, under a *bonâ fide forgetfulness* of facts which disentitled the party to receive it, may be recovered back, though the party paying the money had the means of knowing the fact, and—" however careless he might have been in omitting to use due diligence to inquire into it." " If," said Mr. Baron Parke, " the

* *Graves v. Key*, 3 B. & Ad. 313. And see 1 Williams' Saunders, 325. n. (c.) Sixth Ed.

† *Brisbane v. Dacres*, 5 Taunt. 143.

money be *intentionally* paid, and the party paying *means* to waive all inquiry into the truth or falsehood of the fact, and that the other shall have the money at all events, the case would be different." In exact accordance with this case is that of *Bell v. Gardiner*, 4 Mann. & Gr. 11, which was decided a few months afterwards (1842) in the Common Pleas. The form of remedy adopted to meet such cases, is an action for Money had and received.*

IV. FRAUD. The student may receive it as a general maxim, both at law and in equity, that FRAUD VITIATES EVERYTHING. With the exception of fraud in obtaining Wills of Real Property, Courts of Equity possess an almost universally *concurrent* jurisdiction with Courts of Law, in cases of fraud cognizable in the latter—and *exclusive* jurisdiction in those beyond the reach of Courts of Law. What constitutes Fraud, in the eye of Equity, it is impossible precisely to define; and for a very obvious reason—which was thus assigned by that truly eminent Chancellor, Lord Hardwicke, in his letter to Lord Kaimes (dated the 30th of June, 1759).† "Fraud is infinite; and were a Court of Equity ever to lay down rules how far they would go, and no further, in extending their relief against it; or to define strictly the species, or evidence, of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." In the celebrated case of *Chesterfield v. Jansen*, 2 Ves. sen. 155, he has enumerated five grand *classes* of frauds, to which the student is referred.—It is nearly impossible to enumerate the

* See *ante*, pp. 320—322.

† See Parkes' Hist. of Chanc. p. 588; and see *Lawley v. Hooper*, 3 Atk. 279; *Mortlock v. Buller*, 10 Ves. 306.

instances of relief, by a Court of Equity, from frauds ; and utterly impossible to do so consistently with our present limits. We must content ourselves with stating that these frauds are classified as *actual* or *constructive*. The former, or actual fraud, is in the case of meditated and intentional deception, by means of which one party has taken an unconscientious advantage of another : and it generally assumes the form of Misrepresentation or Concealment. The second is—‘ fraud in law,’ or ‘ constructive fraud.’ By this is meant, such acts or contracts as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury on others, are yet visited with the same consequences as positive fraud, on account of their tendency to deceive or mislead, and injure others, to violate private or public confidence, or to impair or injure the public interests.—It is a grand maxim, both of law and equity, that fraud is never to be presumed, but must be established by proofs. Mere *suspicion*, however vehement, will not suffice to establish the existence of fraud. On the other hand, neither Court insists on positive and express proof of fraud, but deduces it from circumstances affording strong presumption of it. Courts of Equity will *act* on circumstances as presumptive of fraud, where Courts of Law would not deem them satisfactory *proofs*. This very important distinction between the treatment of fraud, by Law and by Equity, may be illustrated by the remark of Lord Eldon,* that a Court of Equity will, as it ought to do, in many cases order an instrument to be delivered up as unduly obtained, which a jury would not be justified

* Fullager v. Clark, 18 Ves. 483.

in impeaching, by the rules of law, which require fraud to be proved, and are not satisfied, although the fraud may be strongly presumed. Both Law and Equity, in short, wage an eternal war with every sort of fraud—and each will assist the other in detecting and defeating it. At Law, no instrument or transaction which can be named or suggested can, if obtained or tainted by fraud, be successfully made the subject either of action, or of application to the Court; while every conceivable kind of fraud which has occasioned injury to another, affords him a cause of action for damages, against the party guilty of it.* Fraud in obtaining a contract, under seal, said Mr. Justice Ashurst, in *Cockshott v. Bennett*, 2 Term Rep. 763, vitiates it as much at Law as in Equity; and may be pleaded, in all cases, in brief general terms, without setting out the circumstances. Here, however, is afforded an illustration of the superior advantages attending a resort, in such a case, to Equity. By filing a bill, in Equity, charging the fraud, and praying that the instrument may be delivered up, the defrauded party not only compels his opponent to state the truth, upon his oath, under peril of an indictment for perjury, but may also have the instrument CANCELLED;—so that he will be no longer in danger of being sued at any distance of time, when the witnesses who could prove the fraud may be dead; and, if the instrument constituted a charge upon his property—"a cloud upon his title"† the incumbrance will, by the decree, be completely removed, and for ever.

* If the student will refer to the case of *Pilmore v. Hood*, 5 Bing. N. C. 97, he will see to what lengths a court of law will go, to give redress against fraudulent conduct.

† *St. John v. St. John*, 11 Ves. 535.

Such is a brief, and it is feared imperfect, outline of the four great sources of the CONCURRENT jurisdiction of Equity with Courts of Law; and we agree with Mr. Justice Story in the opinion, that the flexibility of Courts of Equity, in adapting their relief to the precise exigencies of suitors, is illustrated, in a very striking manner, in these cases of account, accident, mistake, and frauds.* Let us proceed, however, to notice,—

II.—The AUXILIARY jurisdiction of Equity is equally potent, and beneficial. It will remove legal impediments to the fair decision of a question depending at law. It will prevent a party from improperly setting up, at a trial, some title, claim, or defence, which would be unconscientious and inequitable. It will compel him to discover, on his own oath, facts which he knows are material to the right of the other party, but of which a Court of Law cannot compel the discovery. It will, when absolutely necessary, perpetuate the testimony of witnesses to rights and titles which are in danger of being lost before the matter can be tried. It will provide for the safety of property in dispute, pending litigation. It will set aside, control, or counteract, fraudulent judgments; and, in these and various other ways, afford timely and effectual assistance to the cause of justice.

III.—The EXCLUSIVE jurisdiction of Equity is very extensive. Where substantial justice entitles the party to relief, but the positive law is silent, it is impossible to define the boundaries of the jurisdiction of Equity, or enumerate, with precision, its various principles. A faint outline may, however, be attempted. Equity exercises an exclusive jurisdiction in all cases of merely equitable

* 1 Eq. Jur. p. 350.

right—i. e. such rights as are not recognised in Courts of Law. Most cases of TRUST and CONFIDENCE fall under this head. Equity also frequently grants special relief, beyond the reach of the Common Law. It will, as already stated, *grant* INJUNCTIONS, for instance, to prevent waste, or IRREPARABLE injury; to secure a settled right; to prevent vexatious litigation; to compel the restitution of title-deeds. It will appoint receivers of property, when it is in danger of misapplication; it will prohibit a party from leaving the country, in order to avoid a suit; and, in short, restrain any undue exercise of legal right, against conscience and equity.

It will interpose to decree the rescission, cancellation, or surrender of agreements, securities, and other kinds of instruments improperly obtained, or withheld, and the delivery up of chattels to the rightful owner; to restrain alienations of property; to prevent the transfer of stock, and of negociable instruments; infringements of copy-right, and inventions; the publication of private MSS. and of letters; of dramatic performances; of magazines in a party's name; the disclosure of secrets, whether relating to trade or title, or any other important secrets, communicated in the course of confidential employment; an author's writing for another theatre; improper sales of property; a husband's transferring his wife's property, in fraud of her legal or equitable rights; the alienation of heir-looms, pictures, statues, plate, books, and horses; the ringing of a bell contrary to contract; the sailing of a ship; and to order the yielding up or delivery of property in possession. It will restrain one or several partners in a firm, from doing any acts, during the continuance of the partnership,

injurious to its interests—as, by drawing checks, drawing, accepting, or indorsing bills of exchange and promissory notes; or enticing away customers.—From this brief sample of the cases in which a Court of Equity will interfere by way of injunction, it will be readily seen that the existence of such a power is manifestly indispensable for the purposes of social justice, and should therefore be steadily upheld and fostered. It must, at the same time, be admitted, that the exercise of this vast power is attended with no small danger, both from its summary nature, and its liability to abuse. It ought, therefore, to be guarded with the most anxious caution, and applied only in very clear cases: or, instead of being an instrument of justice, it becomes the means of most grievous injury and oppression,—of extensive, and often irreparable, injustice. “There is no power,” justly observes an American judge,* “the exercise of which is more delicate—which requires more caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. If it issue erroneously, an irreparable injury is inflicted—and for which there can be no redress; it being the act, not of the party who prays for it, but of the Court.” The student is also referred, for the vigorous expression of similar opinions, to the judgments of Lord Cottenham, C., in *Brown v. Newall*, 2 Mylne & Craig, 570; and Lord Brougham, C., in *The Earl of Ripon v. Hobart*, 3 Mylne and Craig, 169. The impetus given to the exercise of this power, from the prodigious and rapid extension of Railway undertakings, is daily occasioning interference by Courts of Equity, in order to prevent

* Mr. Justice Baldwin, in *Bonaparte v. Camden and Amboy Railway*, Chap. 1 Bald. C. R. 218

injuries to private property, by an excess, abuse, or misapplication of the corporate powers of the Companies. In these, and innumerable other cases, incalculable and irremediable mischief is done by the imprudent exercise of such extraordinary powers—mischief never coming under the notice of the public, but occasioning injury and ruin to great numbers of people. Some persons have, perhaps not without reason, expressed an apprehension that injunctions are too easily granted; and they point to the number of those which are dissolved very shortly after having been granted. In the twinkling of an eye, the progress of vast undertakings, in which thousands of workmen are engaged, and immense capital is embarked, is suspended—all movements being arrested, as if by magic—occasioning possibly the irreparable loss of hundreds and thousands of pounds a day, by an injunction obtained secretly, and *ex parte*. At the same time, there are great difficulties imposed upon an Equity Judge, in such instances, from the strong case made out to him by affidavits, to which, except in rare cases, he must give credit, and upon which he must act *instantly*. The chief practical check upon unjustifiable applications of this nature, is the infliction of costs: which, however, though ordered, cannot, in many cases, be obtained, from the speculating and unsubstantial applicant for the injunction.

Equity, as already briefly explained, exercises another grand engine for furthering the ends of justice, that is, her power of giving SPECIFIC RELIEF, and of COMPELLING SPECIFIC PERFORMANCE, in a vast variety of cases, but especially in those of contracts. Courts of Equity, on such occasions, often follow the law, and sometimes go

very far beyond it. The right of the party to obtain damages, if he should proceed at law, affords no sufficient clue to the exercise of this power, but is, on the contrary, calculated to involve the inquirer in endless perplexity. Sometimes damages are recoverable at law, when equity will nevertheless refuse to decree specific performance; and sometimes damages may *not* be recoverable at law, and yet equity *will* decree specific performance. The exercise of the whole branch of jurisdiction respecting the rescission and performance of contracts, it must be observed, is matter not of *right in the parties*, but of *discretion* in the Court, governed by the application of sound general principles to the circumstances of each particular case. It is, on this account, impossible to lay down safely any universal rules upon this subject; or to attempt to limit the principles, or exceptions, rendered necessary by the complicated transactions of mankind, and the endlessly varying habits of society, at different times, and under different circumstances. The best means which can be adopted by the student, in order to obtain a correct and available *general* knowledge of this most important subject, are a frequent and deep reflection upon the general maxims acted upon by courts of Equity, as enumerated in a previous page;* and the application of them to the principal cases in which specific relief, and performance, have been either granted or refused; special attention being directed to the character and situation of the respective parties. As to CONTRACTS, whether relating to real or to personal property, the general rule would seem to be—that where the breach of *any* contract would occasion *irreparable* mischief, not adequately reme-

* *Ante*, pp. 323—5.

diable at law, such breach, if *affirmative*, may be prevented by injunction, and, if *negative*, by a decree of specific performance. It requires, moreover, a much greater strength of case to obtain, than to resist, such a decree. A contract, to be thus specifically enforced, must not be merely *nudum pactum*, i. e., a naked, or *voluntary* agreement, but founded on a valuable and meritorious consideration. It must, again, be mutual, and reciprocally binding: if, therefore, one of the *necessary* parties to it be an *infant*, or *married* woman, the Court will not, even at his or her instance, decree specific performance.* Great weakness of intellect, especially if there be just ground for suspecting the presence of any fraud, surprise, or mistake, will induce Equity to refuse its interference: but, generally speaking, Equity "will not measure the size of people's capacities and understandings,"—there being no such thing as an equitable incapacity, where there is a legal capacity. A general rule, relating to the nature of the contract itself, is, that a party seeking the aid of Equity to enforce it, must show it to be *certain*, *fair*, *just*, and *legal*; and Equity regards the *substance*, not the mere letter, or detail of a contract. A Court of Equity will never thus interfere in cases of hard and unconscionable bargains; or where its decree would produce injustice; or would have the effect of compelling a party to do a dangerous, illegal, or criminal act; or would be against public policy; or would involve a breach of trust; or of a thing, the performance of which would be attended

* At law, infancy is merely a personal protection to the infant, who alone can take advantage of it. He may therefore sue, if he choose, a party contracting with him; but it is otherwise with a married woman, whose contract is absolutely void, *ab initio*, and confers no rights whatever against the other party.

with overpowering, enormous mischief, and ruin to the party;* nor, finally, in cases where, under all these circumstances, such a decree would be inequitable. An applicant for specific performance must show that he has himself been in no substantial default; nor guilty of *laches*, or negligence which has not been clearly acquiesced in by the opposite party. Equity does not regard *time* to be of the essence of the contract, unless either the parties have explicitly declared it to be so, or it necessarily follows, from the nature and circumstances of the contract. The leading principles on which Equity will decree, or refuse to decree, specific performance of contracts relating to the sale of real property, are now pretty well settled; but their application is often matter of extraordinary difficulty, equally in cases of applications by the seller, or buyer, of real property. Suppose the case of a *purchaser*, for instance, in a case where the contract neither has, nor can be, strictly complied with; where the seller cannot make a complete title to all the property sold; or there has been a substantial misdescription of it, in important particulars, in the conditions and the contract of purchase; or where the terms, as to the time or manner of execution, have not been punctually or reasonably complied with by the vendor. Is the vendor—asks a Court of Equity—who is then in fault, to *take advantage of his own wrong*? No, she replies; and in such cases generally, at the instance of the purchaser, decrees specific performance of the contract, as far as the seller

* See how a Court of Law will deal with an agreement to do a particular act, which cannot afterwards be performed but at "a dead loss," in the case of *Gwillim v. Daniels*, 2 Crompt. Mee. & Rosc. 61, and *Jones v. Shears*, 346. A Court of Equity would possibly, in these instances, have refused to decree specific performance.

can perform it; abating the purchase money, or giving compensation for the deficiency. The purchaser is in fact, in such cases, allowed an election; either to proceed with the purchase *pro tanto*, or to abandon it altogether. Questions of great delicacy and difficulty are often involved in the application of the above principles to cases within the *Statute of Frauds*.

Such is a very faint outline of the manner in which Equity wields these her two most potent weapons; and, in parting from it, we shall make the general observation—that an expert practitioner in Equity must possess not only an accurate and extensive knowledge of the circumstances and considerations influencing Courts of Equity in granting such applications; but that knowledge must be PROMPTLY available: for this sort of movement is generally made suddenly—in desperate emergencies—where a moment's delay would be almost fatal: and yet, if there should be any material deficiency, or error, in the bill, or in the affidavits by which it is supported, his clients will not only lose—at all events for a time—the benefit of the desired interference and protection of Equity, but experience a most mortifying and mischievous defeat, accompanied by a serious and useless expenditure of money over the abortive proceedings: nay, have to bear not only his own, but often his opponent's costs. Here again we may ask—how can the Equity practitioner dispense with a sound knowledge of the nature, not merely of equitable, but of *legal* rights and remedies? Should he not be able to know the precise moment when the exigencies of his case have drawn it over the boundary line between Law and Equity?

The student must also be apprised, that Courts of Equity exercise a peculiarly solicitous, vigilant, and beneficial superintendence and control over the interests, affairs, and conduct of Married Women, Infants, Lunatics, Partners, Charities, and Trustees.—

I. MARRIED WOMEN.—At law, man and wife are treated, *for most purposes*, as one person; the very being and legal existence of the woman, as a distinct person, being incorporated and consolidated into that of her husband. The Civil Law, on the contrary, regarded them as two distinct persons; and Equity, to a considerable extent, adopts the same rule: regarding husband and wife as capable of contracting with each other—suing each other,—and of possessing separate estates, debts, and interests.

II. INFANTS.—It is a settled maxim, that the Sovereign is the universal guardian of infants, and ought, in the Court of Chancery, to take care of their fortunes. That Court will, therefore, when the infant has property, appoint guardians, or when necessary remove those appointed, either by the Court itself, or by the Common Law, or even testamentary and statute guardians: and will compel the guardian to do his duty to his ward. It can remove infants from the custody of their parents, and itself superintend their education and maintenance: a most delicate power this, and to be exercised with consummate caution; but its existence is indispensable to the sound morals, good order, and just protection of civilised society. After it had been exercised for a hundred and fifty years, the right was questioned in the great case of *Wellesley v. Wellesley*, 2 Bligh (N. S.), 124; 1 Led. 128 to 145, [reported also in 2 Russell, 1—20, 21,] but

was confirmed by the unanimous decision of the House of Lords, sustained by a weight of authority and reasoning rarely equalled.* Infants may be made wards in Chancery; and then no act can be done affecting their person, property, or estate, without the direction and authority of the Court. In the case of the approved marriage of its wards, the Court will take special care of their interests; taking peculiar pains to ascertain the suitability of the match, and secure a proper settlement of their property: while the abduction of one of its wards it visits with exemplary and condign punishment.

III. IDIOTS AND LUNATICS.—The Court of Chancery takes extraordinary care to ascertain the reality of an alleged lunacy or idiocy in the case of persons possessed of property: and when it has been clearly established, exercises complete and most satisfactory control over their persons and properties. These unhappy cases draw largely upon the time and anxiety of the Lord Chancellor; whose jurisdiction in such cases is specially delegated to him by Commission from the Crown.

IV. PARTNERS, with their complicated rights, duties, liabilities, and interests, can scarcely be dealt with fitly by the law; at least, as between themselves. Their rights and liabilities in respect of *third* parties, and the public, however, can be frequently ascertained and adjusted satisfactorily by an action at law. A Court of Equity has an almost despotic power over the contract of partnership: it can even dissolve it during the currency of the term stipulated for. It can thoroughly investigate the state of partners' accounts; and guard the partnership

* 2 Stor. Eq. Jur. pp. 551, *et seq.* (2d ed.).

business, property, and interests, from being injured or interfered with by any of its members.

IV. CHARITIES.—The Court of Equity has exclusive jurisdiction in all Charitable Uses and Trusts of a public description; and exercises a very extensive, powerful, and beneficial control over their administration. It will call the trustees to an account for any kind of negligence, misconduct, or malversation in respect of the management of their trust, and remove them, and appoint new ones wherever it may be requisite. It will rescind improvident alienations of the trust-fund, and, when necessary, project and establish *SCHEMES* for carrying properly into effect the intentions of the donors; and, in short, afford every kind of needful counsel, relief, and assistance: carefully abstaining, however, from usurping upon the just province of those to whom the administration of the charity may have been lawfully confided; unless, indeed, such functionaries should be abusing their trust in the management of the revenues.* It is in his capacity of guardian of these precious and holy interests—for such surely they may be called—that the Lord Chancellor is styled the “keeper of the conscience” of the Sovereign.

V. TRUSTEES of every description (and under this head, on grounds which will be presently explained), may be classed *Executors* and *Administrators*. In matters of trust, Equity moves in her own original, peculiar, and all but exclusive province. The principles acted upon by the Courts of Law were formed in early times, when men’s necessities being few, their rights were also few and simple. Hence it came to pass, that in process of time

* See a concise and accurate account of all these matters in 3 Stephen’s Commentaries on the Laws of England, pp. 221, *et seq.*

there have arisen innumerable rights, based on the principles of natural and universal justice, for injuries to which *the law* has provided no remedy. This is peculiarly the case in matters of *trust* and *confidence*, of which the Courts of Law may be said to take scarcely any notice whatever. Courts of Equity, in this silence of the Law, interfered to compel the performance of the trust, in order to prevent a total failure of justice; considering the conscience of the party intrusted, to be bound to perform the trust. While thus, on the one hand, compelling trustees fully and effectually to do their duty, Courts of Equity will, on the other, afford them complete protection in the due performance of their often laborious and important duties, and assist them whenever they seek the aid and direction of the Court, as to the establishment, management, or execution of the trust. We have observed that trusts are almost exclusively cognizable in Equity; and this is so: there being very few cases, except those of bailment, and such rights founded on contract, as can be enforced by an action of *ASSUMPSIT*,* in which a remedy can be afforded by Courts of Law. It may at all events be safely stated, that where the remedy in respect of trusts ends, at law, it begins in Equity. The proper notion of a '*trust*' is—'an equitable right, title, or interest in property, real or personal, *distinct from the legal ownership* of the property.'† This legal owner appears, to the eye of common law, the absolute owner of the property: but the income, profits, or benefit arising from it, and in his hands, really belong wholly, or in part, to others. This legal estate in the property, is made subservient to

* See this form of action explained hereafter.

† 2 Stor. Eq. Jur. § 964. Vide *ante*, pp. 302, *et seq.*

certain ‘uses,’ *benefits*, or *charges*, in favour of others : and these uses, benefits, and charges constitute the “Trusts” which a Court of Equity will compel the legal owner, as trustee, to perform, in favour of the “*cestui que trust*,” or beneficiary.—Legal estates were the *primary* and proper forms of property in land, from the earliest period of the Anglo-Norman jurisprudence ; but *equitable* estates are not only of posterior, but derivative origin, and proportionably more complex and artificial in character.* *Trusts in real property are exclusively cognisable in Equity* : but are now governed by the same rules as corresponding estates at law ; affording a very striking illustration of the maxim which has just occupied so much of our attention, viz. that Equity follows the law—that is, seeks out and guides itself by the analogies of the law. Thus, for instance, Trusts are, like *lands*, descendible, devisable, and alienable : and the heirs, devisees, and alienees of them may, and generally do, take the same interests, in point of construction and duration, and are affected by the same incidents, properties, and consequences, as would be applicable, under similar circumstances, to legal estates.†—It would be in vain to attempt, interesting though it might be, here to point out the effect produced upon Courts of Law and Equity, by the introduction of “uses”—that “child of the imagination,”‡ to adopt the language of Blackstone, “from which were deduced all the refinements and niceties” in which the courts luxuriated, “when once a departure was permitted from the plain simple rules of property established by the ancient common law.” The Judges of the Common Law Courts soon began to apply a more minute and complex

* 1 Steph. Comm. 328 ; and see 2 Bla. Comm. 327.

† 2 Bla. Comm. 337 ; 2 Stor. Eq. Jur. 215.

‡ 2 Bla. Comm. 331.

construction to conveyances *to uses*, than to others, and by a long train of Equitable decisions, succeeded in vastly curtailing and diminishing the power of the Court of Equity over landed property. There were, however, one or two technical scruples, which the Judges, with all their eager astuteness, could not get over; and Equity, quickly seeing her advantage, at length overthrew the cunningly-erected structure, and re-established her power with tenfold increase; converting the doctrine of uses into that of *trusts*, which in conscience ought to be performed.* The elegant and interesting account of this subject given by Blackstone, and the eighth chapter of Mr. Williams's "Principles of the Law of Real Property," are well worthy of attentive perusal by the student. It is not to be imagined that a "*trust*" is created only by the direct positive acts of the party, in formal written documents; such are called *express* trusts; but a vast field of action to Equity is also afforded by IMPLIED OR CONSTRUCTIVE TRUSTS,—by which is meant such trusts as are deducible from the nature of a given transaction, as matter of clear intention, though not found in the words adopted by the parties; and such also as are superinduced by operation of law upon the transaction, as matter of Equity, independently of the particular intention of the parties.† In this region are to be found exhibited some of the most masterly and profound operations of which the human mind perhaps is capable.

It is upon the great principle, that Equity will enforce the execution of *trusts* where property has come, bound by a trust, into the hands of parties whose duty it is to execute

* 2 Bla. Com. 337.

† 2 Stor. Eq. Jur. 222, 223.

that trust, and preserve the property for those who are really entitled to it, that a Court of Equity has mainly founded her jurisdiction over executors and administrators: whom it regards as clothed with a *constructive trust* to obey the direction contained in the will, or prescribed by the law. Properly speaking, this species of Equity jurisdiction is concurrent, sometimes with that of law, and sometimes with that of the Ecclesiastical Court: and here is to be observed an interesting and important inference, that Equity will, in such cases, be governed by the law of that forum in which the suit was originally cognizable. In a suit in Equity, therefore, for a legacy charged on *personal* estate, the right of the legatee will be governed by the *Civil Law*: but if the legacy be charged on *real* estate, then the right of the legatee will be governed by the rules of the *Common Law*; because, in the latter case, the jurisdiction of the temporal court is original, and exclusive. Very delicate and difficult questions frequently depend upon these distinctions. One such may be seen in the case of *Barker v. May*, 9 Barn. & Cress. 489, in which the Court of King's Bench prohibited the Ecclesiastical Court from entertaining a suit for a legacy. Another interesting case, relating to this subject, is one in the Ecclesiastical Court—viz., *Grignion v. Grignion*, 1 Haggard's Rep., 535, (*vide ante*, pp. 277 (n), 286,) and which governed a question submitted to the author only three days before writing this paragraph. It is a rule that Equity will interfere where there is a *trust* affecting a legacy. In the case before the author, the legacy was originally involved in a trust, but *its purpose had expired*, and nothing remained for the executor-trustee to do, but simply pay the money. The case of *Grignion v. Grignion* decides, that in such a case

the legacy may be recovered in the Ecclesiastical Court; and the able and elaborate discussion of the question, in the judgment of Sir John Nichol, will repay the student's perusal. He is also referred to the very clear and instructive account of the whole matter, to be found in Mr. Justice Story's *Equity Jurisprudence*, vol. 1, chap. ix., title *Administration*. Before quitting this topic, let us assure the student that nothing which has been advanced on the subject of Uses and Trusts, should lead him to suppose that a thorough and complete knowledge of the doctrine concerning them, is one whit less essential to persons practising in the Common Law Courts, than to those whose province is in Equity; as will be abundantly apparent when we come to explain the nature of Common Law learning and practice, and those of *Conveyancing*. We can do no more than simply allude—and that, too, at the risk of some little repetition—to the action of Equity in certain important classes of cases.—INTERPLEADER. This has been already briefly alluded to.* *BILLS QUIA TIMET*;† the object of which is to secure the preservation of property to its appropriate uses and ends, in all cases where there is danger of its being converted to other purposes, diminished, or lost by gross negligence—equally in cases where there is a right of present, or of future and contingent enjoyment. *BILLS OF PEACE*—are so called, because their object is to procure repose from continual litigation. A bill of this kind is brought to establish and perpetuate a right claimed by time, and which, from its nature, may be controverted by many persons—possibly by large classes of persons—at different times, and by

* *Ante*, pp. 315, 6.

† So called in analogy to certain ancient writs (*Brevia anticipantia*, writs of prevention) of the Common Law. Vide Co. Litt. 100, a.

different proceedings: or where separate attempts have been already unsuccessfully made to overturn the right, and justice requires that the party should be quieted in the right, if already sufficiently established. *Interest reipublicæ ut sit finis litium*.—BILLS OF DISCOVERY.* This is a bill asking for no *relief*, but seeking simply the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds or writings, or other things within his power, in order to maintain the right or title of the party asking for the discovery, in some suit or proceeding in another Court. This bill will be entertained in all cases where some well-founded substantial objection does not exist against the exercise of the jurisdiction. BILLS TO PERPETUATE TESTIMONY.—The object of these bills is to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation. Bills of the same kind were entertained by the Roman Law. As, however, there exist grave objections to the exercise of such a jurisdiction—*e. g.*, as leading to trials upon written depositions, instead of by *vivâ voce* examination—and, from the circumstance of such evidence remaining unpublished till the death of the witnesses, affording perilous facilities for perjury—courts of Equity will not entertain such bills, unless in a case of absolute necessity to prevent a failure of justice.† BANKRUPTCY—but this is a matter of such great importance as to require a more extended notice.

Anciently, every species of Equity jurisdiction was exercised by the Chancellor personally;—and he may

* The Romans had their Bills of Discovery, called *Actiones ad exhibendum*, and *Actiones Interrogatorie*.

† See *Angel v. Angel*, 1 Sim. & Stu. 83.

still do so. The first assistance which he derived was from the appointment of a Master of the Rolls, in the time of Henry VIII. Cardinal Wolsey was then Chancellor, and is said to have introduced the jurisdiction and practice of the Rolls Court, in hearing and determining causes in the absence of the Chancellor. It was long a matter of great doubt whether the Master of the Rolls had any judicial authority, *virtute officii*, or owed it all to the power expressly and particularly delegated to him. To put an end to all such difficulties, an act of parliament (3 Geo. II. c. 30,) was passed in 1730, reciting the existence of "divers questions and disputes touching the authority of the Master of the Rolls, in the High Court of Chancery." This statute gave him precisely the same original jurisdiction as that possessed by the Lord Chancellor; except in cases where, by the antecedent course of practice, the Lord Chancellor *must have acted personally*: and it also requires the Chancellor's signature to the orders and decrees of the Master, in order to give them complete efficacy. The jurisdiction, of the Master of the Rolls was, in 1833 (stat. 3 & 4 Will. IV. c. 94, s. 24), greatly extended. All his Orders, however, may be discharged, reversed, or altered, by the Lord Chancellor. Thus stood matters till the year 1813; when such was the enormous pressure of business on the Chancellor, that by stat. 53 Geo. III. c. 24, an assistant Judge was created, under the title of the *Vice-Chancellor of England*. Equity business continuing steadily and rapidly to increase, it was deemed expedient, in the year 1841, (by stat. 5 Vict. c. 5,) to create two new Vice-Chancellors; and to transfer the Equity jurisdiction of the Court of Exchequer, to the Court of Chancery. There are now, therefore, five Judges who

preside and administer justice in the Court of Chancery—the Lord Chancellor (who is the highest judicial character in the kingdom), the Master of the Rolls, and three Vice-Chancellors. There are also twelve MASTERS IN ORDINARY, including the Master of the Rolls (who is the head of them), and the additional Master appointed by stat. 5 Vict. c. 5, s. 32: all of whom perform duties of great importance and difficulty. There is in fact scarcely any question of either *Law* or *Equity*, or of disputed fact, which a Master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the Court:* any error or miscarriage of his, being made the subject of Exception, discussion, and rectification. Upon these officers, also, has been devolved, since 1833, a considerable portion of the details of ordinary business formerly transacted in Court, subject to appeal to any of the Equity Judges.—Such being an outline of the present machinery of the Court of Chancery, let us return to the subject of BANKRUPTCY. The Chancellor's jurisdiction over this matter, was originally conferred upon him by the legislature, in the time of Henry VIII.;† and he exercised it down to the year 1825, when, by stat. 6 Geo. IV. c. 16, was effected a grand consolidation of the whole of the Bankrupt Law; and after that period, down to the year 1831; when it became necessary to relieve the Chancellor almost entirely from the constantly increasing pressure of Bankruptcy business. For this purpose, in the last-named year, an entirely New Jurisdiction was created by stat. 1 & 2 Will. IV. c. 56; being a court consisting of a Chief Judge and three other

* Sydney Smith's *Chanc. Prac.* vol. i. p. 14 (3d ed.).

† 35 Hen. VIII. c. 4. See 4 Reeves 254.

Judges, and of six Commissioners. It is a Court of both *Law and Equity*, and, together with the Judges and Commissioners, has all the powers and privileges incident to a Court of Record. The Judges, or any three of them, form a COURT OF REVIEW, and have superintendence and control in all matters of Bankruptcy co-extensive with, but not exceeding* the Chancellor's former jurisdiction, and subject to an appeal to him in matters of law and equity, or on the refusal or admission of evidence. Still further to facilitate the administration of Bankruptcy, the six Commissioners were formed, by the Act in question, into TWO SUBDIVISION COURTS, consisting each of three Commissioners, and constituting Courts of Record. It was soon found, however, that four Judges were more than were requisite for the business of the Court of Review; and in 1835, by the 5 & 6 Will. IV. c. 29, s. 21, the number was reduced to three, *i. e.* two beside the Chief Judge. In 1837, any *one* of the Judges was empowered (by royal warrant under the sign manual) to exercise the functions of the whole Court; and in 1842 it was enacted by stat. 5 & 6 Vict. c. 122, s. 64, that the Court might be formed by one Judge. There are now only two Judges of the Court of Review, the Vice-Chancellor Knight Bruce, and Sir George Rose (since appointed one of the Masters in Chancery); but the former alone, without any additional salary, presides, except under special circumstances, in the Court of Review. By sects. 5 & 6 of the last-mentioned Act, a very important alteration was effected in the machinery for working our Bankruptcy law, viz. the appointment of twelve Commissioners, to act in the

* *Exp. Lucas*, 1 Mont. & Ayr. 103.

country, in seven districts, viz. those of Manchester, Leeds, Liverpool, Birmingham, Bristol, Exeter, and Newcastle-upon-Tyne. Any one of these Commissioners may constitute a district Court of Bankruptcy. All these Commissioners act under and are subject to the control of the Court of Review, to which there lies an immediate appeal; the latter court being itself subject, as above stated, to the interference of the Chancellor, on appeal: and from him, in cases of adequate importance and difficulty, an appeal lies to the House of Lords.

It remains to be observed, that the persons eligible to fill these various offices in Bankruptcy, are practitioners at either the Common Law or Equity Bar. *Ten years' standing at the Bar, as barrister or serjeant, is requisite in the Chief Judge; but in the case of a puisne judge in the Court, five years' standing at the Bar, after five years spent in practice under the Bar, as a special pleader, will suffice.* The six town Commissioners must be of not less than *seven years' standing at the Bar; or of four years' standing at the Bar, after three years' practice as a special pleader.* The twelve country Commissioners must be of not less than seven years' standing at the Bar: no allowance being made (5 & 6 Vict. c. 122, s. 59) for the time spent in pleading under the Bar. Such is the *machinery* for administering the law of Bankruptcy: and sufficient has appeared, in describing it, to apprise the thoughtful reader, that as Bankruptcy is administered according to the principles of both Law and Equity, it must have an equal claim upon the attention of practitioners in Courts of Law, and of Equity. A thorough knowledge of Bankruptcy law is, indeed, every whit as important to the one, as to the other. Common lawyers, as well as Equity lawyers,

practise in the Courts of Bankruptcy; and, in short, in administration of the Common Law, questions involving the rights and liabilities of bankrupts, and of their assignees, and with reference to their creditors and debtors, and third parties incidentally connected with them, give rise to incessant, and often exceedingly difficult, litigation. In the majority of cases, where the validity of a FIAT in Bankruptcy is in issue, the decision of the question rests with a jury, and Common Law Judges. So, whether there has been a valid *act of Bankruptcy*: whether there exists a sufficient *petitioning creditor's debt*; and whether or not a fiat has arisen out of concert, or collusion. Again—the question still more important, and of more direct general concernment to the public at large—whether goods were *in the order and disposition* of the trader, at the time of his committing an act of bankruptcy—is one litigated daily in Courts of Common Law. Questions of fact on all the above subjects, and many others connected with them, are, moreover, often referred directly to the Common Law Court, for decision, by the Courts of Review, and by the Courts of Equity. All the substantial questions, for instance, respecting the rights and liabilities of assignees of bankrupts, are litigated and decided in the Common Law Courts, either at Nisi Prius, or before the Court in Banc: and to the veriest legal *tyro* it must be obvious that the disturbing force—so to speak—of Bankruptcy, upon almost every species of civil rights and liabilities, is felt in all actions, and in every stage of them, and in all proceedings arising out of them, in Courts of Law. Let the student, who may be sceptical on this point, take up any one of the standard Common Law text-books, *e. g.*—Selwyn's Nisi Prius, Chitty on Contracts, and Starkie,

Phillips, or Roscoe on Evidence,—and turn to the head “Bankruptcy” in the Index:—a glance will satisfy him of the truth of our representation.

In addition to this, let us assure the Common Law student that *the course of practical procedure*, in the Bankruptcy Courts, ought to be perfectly familiar to him; or he will be, if he have any chance of introduction to respectable business—continually placed in seriously embarrassing circumstances. The DEPOSITIONS—the EXAMINATIONS—the due ENROLMENT of the proceedings, which is essential to their admissibility in evidence—are continually the subject of sudden and fierce discussion, in the course of a trial; and for a counsel, when the Bankruptcy proceedings are suddenly placed before him, in order that he may, at a glance, explain his own evidence, or contradict, or exclude that of his opponent—to be unable to *pounce at once* upon the material portions of the proceedings—to distinguish between form and substance, is, indeed, a very dangerous thing—and that, too, occurring in a very lucrative and important line of business. Before quitting this subject, we shall take the opportunity of remarking, that the law of Bankruptcy and Insolvency—in other words, the whole of our law of *Debtor and Creditor*,—is in a lamentably confused and unsatisfactory state. If there be any single section of our jurisprudence which ought to be sacred from legislative interference, except upon the most deliberate, profound, and comprehensive consideration, it is, perhaps, that regulating the rights and liabilities of debtor and creditor. Any rash movement in that quarter, infallibly occasions vast injury to society: and yet this is the very department which has been of late years selected by the Legislature—in defiance of the maxim, *fiat experi-*

mentum in corpore vili—as the scene of incessant experiment and speculation, and that, too, upon a grand scale. It is difficult to be guilty of exaggeration in describing the pernicious consequences of such rashness on the part of Parliament. The interests of creditors have been, for instance, compromised by recent enactments, to a truly alarming extent: while *bond fide* debtors, of even the highest respectability and unimpeachable conscientiousness, have been, particularly by the operation of statute 1 & 2 Vict. c. 110, s. 8, placed completely at the mercy of malicious and precipitate creditors. The provisions of statutes 5 & 6 Vict. cc. 116, 122, are equally objectionable, both in their details, and the policy upon which they are founded. While professing to give effective summary remedies to creditors against their improvident and fraudulent debtors, the statutes in question do little else than enable the latter to defeat the former, and the former to harass and crush the embarrassed but honest debtor. Whatever, again, may be said in praise of the policy of abolishing arrest on MESNE Process, the abolition of that in FINAL Process, even to the limited extent to which it has been carried by statute 7 & 8 Vict. c. 96, s. 58, (*i. e.* in cases of debts under 20*l.*) has already ruined thousands—and is, perhaps, daily ruining hundreds of the middle classes of tradesmen and shopkeepers, and is rapidly demoralising the lower orders of society: operating, in fact, as a direct premium upon fraud. Those who have to administer the present law of Bankruptcy and Insolvency, and, indeed, all practical members of the legal profession, can bear, it is believed, conclusive testimony to the truth of these remarks. Whether, after the changes of the last few years, the systems of Bankruptcy and Insolvency Law should be any

longer kept separate, or be blended into one; and whether the Legislature should, with reference to arrest on final process, either retrace its late steps, or proceed to abolish such arrest altogether, endeavouring to devise some new and effectual mode of giving to debtors complete *personal* immunity, without, at the same time, ruining their creditors, destroying credit, and crippling commerce: it is not for us to say. That something decisive, however, must be done, and that promptly, by the Legislature, will be denied by no one competent to form an opinion upon the subject.

Not less necessary to the Common lawyer is a familiar knowledge of the law and practice of Bankruptcy, than is that of the pleadings and procedure in Courts of Equity. How many instances have not been observed, of serious embarrassment occasioned, by the want of such knowledge, to both Common Law and Equity practitioners! Nay, of cases absolutely lost, in consequence of the want of such knowledge, where they ought to have been won! How frequently is the Common lawyer called into action, after the parties have been fiercely contending in Equity; and the Equity lawyer, after a desperate struggle in a Court of Law: in either of which cases, the respective proceedings are laid before him—and form the subject of constant comment and argument in open Court. How easy is it to imagine the position of a counsel on such occasions, utterly ignorant of the distinction between the substantial and merely formal parts of the proceedings, and the effect of them: unable to light at once upon the true *gist* of them! What advantages to his client are lost—what points overlooked—what gross and daring misrepresentations may be hazarded with impunity by a dexterous and unscrupulous opponent! “Why should you come into

Equity?" recently inquired an Equity Judge of counsel, during an argument in Court,—“when you have, unless I am mistaken, a ready and efficacious remedy at Law?”—“Ready and efficacious!” was the reply,—“quite the reverse! To attempt to bring these frauds before a Court of Law, would be to court defeat, if only from the excessive precision and intricacy of the pleadings requisite—” —“Surely that is not so! I do not pretend to be *very* familiar with legal proceedings, but I imagine that there is some plain and compendious way of bringing a question of fraud before either the Court, or a jury—” —“Possibly that may be so, where fraud is relied on as a defence, though I believe it is not so—for it is a rule at Law, that fraud must be *specially* pleaded; * but in the case of a *plaintiff* seeking relief from fraud, it is far otherwise—” —“My friend is quite in error,” said his opponent, who was assisted by a member of the Common Law Bar—“His client may, if the statements of this Bill be correct, discuss the whole question at Law, on pleadings extending to half a dozen lines—namely, by an action for Money Had and Received: and as for a *defence* at law, it is sufficient to allege fraud *generally*, in about a dozen words!” [Here the common law counsel referred to the case of *Hill v. Montague*, 2 M. & S. 377.] “Well, so it struck *me*,” said the Judge—“and if so,” turning to the other counsel, “the whole foundation of your case fails:—you had not the least pretence for coming into this Court:”—and the Bill was presently dismissed with costs!

From the foregoing pages, we trust it has been made manifest to the student how dangerous is the error

* See *ante*, pp. 320, 341.

of regarding Law and Equity in the light of "two separate and distinct professions," whose "forms and pleadings have as little similarity as if they existed among nations whose laws and customs were wholly strange to each other;"—according to the notions of Sir Francis Palgrave, Mr. Raithby,* and others. A conviction of the paramount importance of *demonstrating* the mischievous fallacy of such a notion, has led us, at the risk, possibly, of fatiguing the reader, to heap illustration upon illustration—to accumulate analogy upon analogy—and cite the testimonies of the most consummate masters both of Common Law, and of Equity. If all this do not suffice for the purpose, we trust that, having done our best, we shall have nothing with which to reproach ourselves. *Liberavimus animas nostras.*

It is now necessary to give the student some general notion of the employment of Equity Draftsmen,—viz., drawing pleadings; a far more laborious, but by no means more difficult or responsible office, than that of the Common Law Pleader; of whose functions a full account will be found in an ensuing chapter, entitled "Special Pleading." The Equity Draftsman is invariably a barrister; whereas, as will be seen, Common Law pleadings are frequently drawn by gentlemen who, sometimes for very many years, practise as Special Pleaders before being, and occasionally without ever being, called to the Bar. PLEADINGS are essentially of the same nature, both at Law and in Equity: and the most terse and elegant description of them is probably that given by Mr. Justice Butler, in the

* *Ante*, pp. 290, 291.

case of *Reed v. Brookman*, 3 T. R. 159, (already referred to—*ante* p. 332). “*Pleading is the formal mode of alleging that on the record, which would be the support or defence of the party in evidence.*” Precisely such is also the case with Pleadings in Equity, of which Mr. Justice Story has given the following fuller definition:—“Pleadings in Equity consist of the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it; of which, when contested in matters of fact, they propose to offer proofs, and in matters of Law, to offer arguments to the Court.”*

The Pleading, in Equity, begins with the Bill, which is in the form of a *petition* to the Court, setting forth the material facts, and concluding with a prayer for the appropriate relief, and for the usual process against the parties whom it is sought to bring into Court, in order to make due answer to the petitioner. A BILL thus commences—

“In Chancery.

“To the Right Honourable John Singleton Lord Lyndhurst, Baron Lyndhurst, of Lyndhurst, in the county of Southampton, Lord High Chancellor of Great Britain,

“Humbly *complaining* sheweth unto your Lordship, your orator, A. B. [*i. e.* the plaintiff] of ———, in the county of ———; *that,*” &c.

A Common Law Pleading commences thus—† with the DECLARATION—

“On the 1st day of April, A. D. 1845.

“In the Queen’s Bench.

“A. B., the plaintiff in this action, in his own proper

* Story on Eq. Pleadings, p. 3, note (1).

† Reg. Gen. M. T. 3 Will. IV. Reg. 1.

person [*or by —, his attorney*] *complains* of C. D., [the defendant in this action,] who has been summoned to answer the said plaintiff in an action of *debt* [as the case may be]. For that," &c.

Thus it will be seen that both the Equity and Common Law suitors approach the Queen in her Courts—as the fountain of justice—with a *complaint* that their opponents have injured them, and a prayer for redress.

In ancient times, Bills in Equity were, in their structure, of great brevity and simplicity, and suitable to the few exigencies of society; but the progressive increase and complication of the common business of life, have rendered, perhaps, unavoidable, the refined, elaborate, and complicated system which prevails at the present day. "Equity pleadings have become," say Mr. Justice Story and Mr. Cooper, "a science of great complexity, and exhibit a very refined species of logic, which it requires much talent to master in all its various distinctions and subtle contrivances, and to apply with sound discretion and judgment to the diversities of professional practice. The ability to understand what is the appropriate remedy and relief for the case; to shape the Bill fully, accurately, and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details: and to decide who are the proper and necessary parties to the suit: this ability requires various talents, long experience, sound learning, and superior clearness and acuteness of perception."* *Common Law* pleadings were, as we learn from Blackstone, "in the reign

* Story's Equity Pleadings, p. 9; Cooper's Equity Pleadings, p. 4. The author has thought proper to lower the tone of the last sentence, which is in the original, heightened into great exaggeration.

of our English Justinian, Edward I., short, nervous, and perspicuous; not intricate, verbose, and formal."* In process of time, however, they acquired a grievous prolixity, which only a few years ago was boldly and suddenly retrenched, by the legislature, and the courts; (see *ante*, p. 25, and *post*, Ch. X.), and the pleadings in every form of action reduced to the severest degree of terseness and simplicity.—To return, however, to those of Equity. They appear to have been originally derived from the civil law, or from the canon law (which is itself derived from the civil law), or from both: and the reason of this is to be found in the circumstance, that the early chancellors were *ecclesiastics*, bred up in the jurisprudence of the civil and canon law, and naturally administered their functions according to the modes of procedure with which they were most familiar. Hence we may find traces of resemblance, at every step, between the pleadings and practice in Chancery, and those in a Roman, and an Ecclesiastical suit. As the Court of Chancery, however, grew in power, attaining more extended jurisdiction, and exercising more diversified powers, new modes of procedure were also gradually adopted, which have led, at length, to a completely distinct and independent system.†

The first stage in the Common Law Pleadings is the DECLARATION—in those of Equity, the BILL; each being the statement of the plaintiff's case, and in neither instance upon oath. Whatever may be the object of the Bill, the first fundamental rule, the observance of which is abso-

* 4 Bla. Comm. 427.

† See 3 Reeves' Hist. Eng. Law, 380; 3 Bla. Comm. 47; Stor. Eq. Plead. 10; and the interesting outline of the proceedings in suits under the Civil and in the Canon Laws, abridged from Gilbert's *Forum Romanum*, in note 3 of the last-mentioned work.

lutely indispensable, is, that such Bill must state A CASE WITHIN THE APPROPRIATE JURISDICTION OF A COURT OF EQUITY. A failure in *this* matter is fatal in every stage of the case, and can never be cured by any waiver or proceeding of any of the parties: *for consent cannot confer a jurisdiction not vested by law*; and every excess of jurisdiction will amount to an USURPATION, which will make the Court's decretal orders a nullity, or infect them with a ruinous infirmity.*

Every Bill in Equity ought to contain a complete statement of everything warranting or requiring the Court's interference; according to the old distich to be found in Comyn's Digest—†

“ Quis, quid, coram quo, quo jure petatur et a quo,
Recte compositus, quisque libellus habet.”

It contains nine parts, some of which are, however, merely formal. The student is referred to the Appendix, Nos. 2, 3, 4, for forms of a Bill, Answer and Demurrer, in order to exemplify the following descriptions; and to show the different method of procedure in a court of law, a *Declaration* at Common Law, is subjoined to the Bill in Equity, for a cause of action arising out of the same transaction which had led to the bill in Equity, viz., the breach of a contract for the sale and purchase of a freehold estate. The thoughtful student is specially recommended to compare these two instruments, with reference to the explanation given in the foregoing pages, of the distinction between proceedings at Law, and in Equity.

I. The first part of a BILL, is, the ADDRESS or direction

* Stor. Eq. Pleadings, p. 7.

† Title, ‘Chancery,’ E. 2.

of the bill to the court in which the suit is instituted.*

II. The INTRODUCTION, *i. e.* the names and descriptions of the persons instituting the bill, and the characters in which they sue—styling themselves “your orator,” or “oratrix.”† The object of this part is to enable the court, as well as the other parties in interest, to know whither, and to whom, they may resort, to compel obedience to any process or order of the court; especially for the payment of costs, and in order to furnish distinct means of decision in all future controversies in regard to the subject matter, and the identity of the parties. III. The STATING PART, or PREMISES, is the grand feature of the bill—its substance and essence. It is upon this that the Court is called to *act*; and experienced skill, and much consideration, are requisite to frame it with proper certainty—as a defect in it may become fatal in any subsequent stage of the suit. This part, then, contains a narrative of the facts and circumstances of the plaintiff’s case; the wrong or grievance of which he complains; and the names of the persons by whom done, and against whom redress is sought. “Formerly,” said Lord Eldon,‡ “a BILL contained very little more than the *stating part*. I have seen such a bill, with a simple prayer that the defendant may answer all the matters aforesaid: and then came the prayer for relief. I believe the interrogating part [*vide post*, p. 374], had its birth before the charging part.” IV. The CONFEDERATING PART, *i. e.* a general (and, it is submitted, as absurd as unnecessary)

* In New York, U.S., the address of a Bill is, “To the Honourable —, Chancellor of the State of New York:” or in the Circuit Courts, “To the Honourable the Judges of the Circuit Court of the United States, within and for the district of —, sitting in Equity.” Stor. Eq. Pl. p. 18.

† In America, “Your orator, A. B., of —, in the County of —, and State of —, Esq.”—*Id.* p. 19.

‡ In *Partridge v. Haycraft*, 11 Ves. 574.

allegation or *charge* of a confederacy between the defendant and other parties to injure or defraud the plaintiff—the names of which other parties the plaintiff “prays may, *when discovered*, be inserted in the bill, and they made parties thereto.” This claim originated in a twofold error—first, the idea that parties could not be added to the bill *by amendment*, whereas there never was a time when this could not be done; secondly, that an allegation of confederacy would sustain the jurisdiction of the court. Confederacy, however—combination—or conspiracy, is clearly cognisable at law, and could at no time have afforded, *alone*, jurisdiction to a Court of Equity.* The charge thus made, being mere impertinent surplusage, is not noticed in the Answer. V. THE CHARGING PART. This is in no case indispensable, and is often omitted; for the *stating part* ought fully to unfold and expound the plaintiff’s case; and the charging part generally contains nothing else than an enlargement of that *stating*. “Lord Kenyon,” said Lord Eldon, in the case of *Partridge v. Haycraft* above referred to, “never would,” [i. e., when an Equity draftsman], “put in the charging part, which does little more than unfold and enlarge the *stating part*.” This charging part usually consists of some allegations setting forth the expected defence or excuse of the defendant, and other matters disproving or avoiding these anticipated defences or excuses. It is sometimes also used, with a view to obtaining a discovery of the nature of the defendant’s case, or to put in issue some matter which it is for the plaintiff’s interest not to admit. This charging part not unfrequently contains most astounding fictions and falsehoods, equally degrading to the administration of public justice, and

* Mitford’s Eq. Pl. (by Jeremy), pp. 40, 41.

insulting and oppressive to defendants. VI. The JURISDICTION clause,—i. e. an averment that the acts complained of are contrary to Equity, and tend to the injury of the plaintiff, and that he has no remedy, or no complete remedy, without the assistance of a Court of Equiry. This clause, also, is a pure superfluity. If the bill disclose a case within the jurisdiction of Equity, it suffices without this clause: if it do not, that clause cannot *give* it jurisdiction.

VII. INTERROGATING PART. Neither is even this part *absolutely* necessary; for if the defendant *fully* answers to the matters of the bill, with their attendant circumstances, or fully denies them in the proper manner, upon oath, the object of the interrogatories is attained. Still, however, special interrogatories are often highly advantageous to the plaintiff for the purpose of sifting the conscience of the defendant, and preventing his evasion of any other of the matters of the bill, by answering *according to its letter only*. Of the utility of these special interrogatories, a striking illustration was given by the late celebrated Mr. Bell, Q. C., in his evidence before the Chancery Commissioners. "I can mention," said he, "a very strong instance, which once occurred to myself. There was the same question, put in rather a different manner, in two different parts of the bill. In the instructions for Answer to the interrogatories, in one place it was answered directly contrary to what it was in the other. The defendant, whose answer I was preparing, was, if I recollect right, a professional man. When I first saw him upon his Answer, he was very much surprised to find that I had answered the question in one place differently from his instructions. I sat down with him to peruse the answer: and when we came to the first question, I read to him the

question, and said, 'Now, your answer which you have written on the margin is to this effect; I will reduce it into technical language; is that true?' 'Certainly it is true.' We went through the answer, and then at last came to the other passage. 'Now,' said I, 'this is your answer to this passage?' 'Certainly it is.' 'Then,' I said, 'I will turn it into technical language,' and we went on with the answer. 'Now, if you please, we will return back and compare the two passages (which I had put on a separate piece of paper). Have the goodness to read them, and let me know which of them you wish to stand.' He took them; read them; and saw that they were a palpable contradiction of each other. He thanked me for my attention to the situation in which, but for this discovery, he would have been placed, and altered the answer so as to make it accord with the fact. Now, that gentleman did not, I think, wish to mislead me; but his attention not being directed at one time to one view of the case, and at another period, to another view of the case, he had fallen into an unintentional mistake; and I am persuaded that if the interrogatories are not put pointedly, there will be many mistakes of that kind. Even if those mistakes did not occur, it would very frequently happen, that though a party wished to state a fact as well as he understood it, you would not get at the whole truth.*" For these reasons, the interrogatories, which may be regarded as a sort of echo of the stating and charging parts of the Bill, are, except in amicable suits, of universal use in practice. A little familiarity with the Common Law mode of examining and cross-examining witnesses, will

* Report of the Chancery Commissioners, 9 March, 1826. Appendix 1 and 2.

here be of great assistance to the Equity draftsman.*

VIII. PRAYER FOR RELIEF.—This must vary, of course, according to the nature of the Bill, the circumstances of the case, and the relief sought. The usual course is, first to make a special prayer for the *particular* relief to which the plaintiff considers himself to be entitled, and then to conclude with a prayer for GENERAL RELIEF, at the discretion of the Court. This latter prayer must never be omitted; for, if the plaintiff should mistake the relief specified in his special prayer, the Court may yet afford it to him under the general prayer; but not so if such general prayer should have been omitted—unless the Court should allow the Bill to be amended. “Praying *General Relief*,” said Lord Chancellor Hardwicke, (‘one of the greatest lawyers,’ according to Lord Eldon, in *Exp. Greenway*, 6 Ves. 813,) ‘who ever sate in Westminster Hall,’) “is sufficient, though the plaintiff should not be more explicit in the prayer of the Bill; and Mr. Robins, a very eminent counsel, used to say, ‘*General Relief* was the best prayer, next to the Lord’s Prayer!’”† It must be added, that the *Prayer of a Bill* demands great attention and consideration; and an accurate specification of the matters to be decreed, in complicated cases, obviously requires the highest degree of experienced discernment.

IX. PRAYER OF PROCESS, *i. e.* to compel the defendant or defendants to appear and answer the Bill, and abide the determination and order of the Court. Great care must here be taken to insert the name of every person whom it

* This practice of putting special interrogatories is derived from the Civil law: its interrogatories were called *libellus articulatus*. Gilbert’s *Forum Romanum*, p. 90.

† *Cook v. Martin*, 2 Atkins’ Rep. 3.

is desired to make parties; for it is a settled rule that none are parties, though named in the Bill, against whom process is not prayed.

On these formal parts of a Bill in Equity, Lord Redesdale has made the following general observations:—
“Some of them are not essential: and, in particular, it is in the discretion of the framer of the Bill, to allege any ‘*pretence*’ of the defendant, in opposition to the plaintiff’s claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a Bill, in all cases, has given rise to the common reproach to practitioners in this line, that ‘every Bill contains the same story three times told.’ In the hurry of business, it may be difficult to avoid giving ground for this reproach; but in a Bill prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operation.”* It remains to observe that, unlike the case of a Declaration at Common Law, every Bill in Equity must have the signature of counsel annexed to it: a practice originating as far back as the time of Sir Thomas More.† The great object of this rule is, to secure regularity, relevancy, and decency, in the allegations of the Bill, and the responsibility and guarantee of counsel, that, upon the

* Mitford’s Eq. Plead. p. 47.

† “Before his time,” says Mr. Cooper, in his *Treatise on Equity Pleadings* (p. 18), “it seems that the *Court itself* examined the Bill: that afterwards the Chancellor delegated that power to particular Counsel: and that subsequently an order was made, that no bill should be filed, unless under the hand of a double reader, or of one of the king’s counsel. At length, however, owing to the increase of business, the Court referred them to the honour of the bar at large. But if the Bill be not signed by Counsel, or the signature be counterfeit, or disavowed,—in the first case the Bill will be dismissed on the defendant’s demurrer; and in the other, on the fact being made known to the Court, it will be ordered to be taken off the file.”

instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed. Hence it is, that *counsel are held responsible for the contents of the Bill*; and if it contain matter irrelevant, impertinent, or scandalous, such matter may be expunged; and the counsel have even been ordered to pay costs to the party aggrieved by such misconduct:—and this duty has been enforced by several pointed general orders of the Court of Chancery.*

There are various kinds of Bills. The most general division is into those which are *original*, and those which are *not original*. The former relate to some matter not before litigated in the Court between the same parties, standing in the same interests: the latter relate to some matter already litigated in the Court by the same parties,—and are either an addition to, or a continuance of, an original Bill; or both. It is impossible, however, here to enter further into the consideration of the various species of Bills, which are numerous, and often depend upon nice and difficult considerations.

Let us now imagine a defendant, either at Law or in Equity, to have before him the plaintiff's *Declaration*, or *Bill*. The first question to be considered in each case, is,—whether the Declaration or Bill be sufficient *upon the face of it*—admitting, for that purpose, the matter of fact to have been truly alleged. Equally at Law and in Equity, may a defendant demur specially, *i. e.* for matter of mere form; or generally—*i. e.* for matter of substance. It may be stated, generally, that in a Court of Equity the

* Beames' Orders in Chancery, 25, 69, 70, 165—7.

modes of defence are fourfold. *First*, by DEMURRER. *Secondly*, by PLEA, showing some cause why the suit should not be dismissed, delayed, or barred. *Thirdly*, by DISCLAIMER: which seeks at once a termination of the suit, by the defendant's disclaiming all interest in the claim or matter contained in the Bill. *Fourthly*, by ANSWER, which controverting the case stated in the Bill, either confesses and avoids it, or traverses its material allegations; or admitting them, submits to the judgment of the Court upon them; or relies on a new case, or upon new matter stated in the answer; or upon both. While at law, as will be seen hereafter, (*post*, Chapter on Special Pleading,) either party may demur generally or specially to every precedent pleading, down to the very last; in Equity, demurrers are allowed to Bills only; being inapplicable to either a Plea, or an Answer. If the former be bad in substance, the course is, not to demur to it, but to set it down for argument, on which, if found bad, it is immediately over-ruled. If the Answer be insufficient in its responses to the charges and statements of the Bill, the objections to it are taken by means of *filing Exceptions* to it. If it be, in substance, bad as a defence, and no further proofs are required by the plaintiff, the case can be set down for hearing upon Bill and Answer, and will be adjudged accordingly.

If a Bill be, on the face of it, unobjectionable, the defendant must meet it, by either a PLEA; or by Plea or Answer; or by Answer only. The former is either a 'pure' plea—*i. e.* one which relies upon matter entirely *dehors* the Bill—such as a *Release*, or a *Settled Account*; or an "anomalous," or "negative" plea—consisting of denials of the substantial matters in the Bill. In pleas, are

required nearly as much strictness and exactness—at least in substance—as in pleas at law : and it must here suffice to say, that for these, and several other reasons, *Pleas* in Equity are of very rare occurrence. A *Disclaimer* is distinct, in substance, from an Answer, though sometimes confounded with it. This is of comparatively rare occurrence, and not of sufficient importance here to require special notice.

The grand battle, in Equity, is generally fought on BILL and ANSWER. When a defendant cannot protect himself from his opponent, by either a Demurrer, or a Plea, or a Disclaimer, he must answer fully all the substantial matter contained in the Bill, subject to four exceptions, to be taken in one of the modes just intimated. *First*, he need not answer matters irrelevant, impertinent, or scandalous ; nor, *Secondly*, anything which may subject him to any penalty, forfeiture, or punishment ; nor, *thirdly*, anything which would involve a breach of professional confidence ; nor, *lastly*, is he bound to discover any facts respecting his own *title*. With these exceptions, a defendant's conscience may be racked, to the uttermost, by a Bill in Equity. An Answer, unlike the Common Law Plea, is given upon oath ; and must, like a Bill, and like most Common Law pleadings, be signed by counsel, unless when taken in the country, by *Commissioners* appointed for the purpose ; in which latter case, the Commissioners are responsible for the propriety of its contents, which are supposed to have been—as was formerly the case *—taken down by the Commissioners from the lips of the defendant.

* Mitford, Eq. Pl. (by Jeremy), 315 ; Cooper's Eq. Pl. 327.

The *Answer* of a defendant in Equity, is the *Plea in Bar* of the defendant at Common Law : each of which is a substantial, conclusive, and complete defence, on the merits, against the Bill, or Declaration. But an answer in Equity is distinguishable from a plea at law in this, that a plea consists exclusively of the defendant's *answer* to his opponent's case ; while the *Answer* in Equity superadds to this the examination by the plaintiff, to which the defendant is obliged to submit. The Common Law plaintiff, however, may reply, or demur generally or specially, to the plea—and the defendant deal in like manner with the Replication ; the plaintiff with the rejoinder ; the defendant with the surrejoinder ; the plaintiff with the rebutter ; and the defendant with the surrebutter. Each party—in other words—may plead or demur at every stage of the proceeding. Thus also was it, formerly in Equity ; till the inconvenience, expense, and delay of such proceedings led to an alteration of the practice. If a plaintiff find any matter in the Answer requiring a reply, he *amends his Bill*, and charges afresh : a corresponding right being reserved to the defendant, of answering the amendments. Hence it follows that a Replication in Equity is now a matter of mere formal and general denial of the Answer. With it terminate the Equity pleadings : and the parties proceed at once to the examination of witnesses to support the facts alleged by the pleadings on either side. This examination is conducted on both sides by means of written questions *prepared* by counsel, but *put* to the witness by the proper officer of the Court, in town or country, who reads over to the witness all his answers to such questions, before allowing him to sign or swear to them. Much has been said and written upon the comparative merits of this

mode of obtaining evidence, and of that of the Common Law Courts, viz. by the *viva voce* and open examination of witnesses. In favour of the latter will be found a very striking passage in 3 Blackst. Comm. pp. 373, 4; of the former, one equally striking by Lord Stowell, in the case of "*The Odin*," 1 Robinson's Admiralty Rep. 254.

So much for the *fabric* of Equity pleadings. That, on the one hand, its due construction requires a clear, experienced, energetic, and decisive intellect, called upon as often is the Equity draftsman, to act in cases of vast importance,—*suddenly* and immediately—is indisputable: while, on the other hand, there is undoubtedly but too much ground for those imputations of verbosity, repetition, and tortuosity, entailing ruinous and useless expenditure on the parties, to which Equity practitioners have long been obnoxious. We who say this, with due humility and deference, as belonging to the class of Common Law pleaders, are aware of the justice with which similar accusations were brought against the framers of Common Law pleadings, before the recent interference of the Legislature, already several times alluded to; and trust we are not presumptuous in hinting an opinion that Equity pleadings might be advantageously pruned as severely as have been our Common Law pleadings. Numerous and most important improvements have undoubtedly been recently effected in the practice of Courts of Equity: may the "blessed amending hand" proceed further, with temperate energy!

Equity is principally administered, as already explained, in five Courts: viz., the Lord Chancellor's, the three Vice-

Chancellors', and the Master of the Rolls' Courts; which, during term time, sit at Westminster; and out of term, in Lincoln's Inn. Reports of the proceedings in all these five Courts appear regularly; and constitute, however valuable, a serious tax upon Equity Practitioners.— Since the late addition of the two new Vice-Chancellors' Courts, and the melancholy mortality among the senior members of the Equity Bar, the business of these Courts has been greatly distributed, and a large accession made of new members to the Equity Bar; many of whom exercise the functions of both conveyancers and Equity draftsmen. There is unquestionably a great amount of talent and learning, though not of a brilliant, or at least shining character, in these ranks of the profession; but the character of the Equity Bar would undoubtedly be raised far above even its present elevation, if its members would act upon the advice of their late illustrious chief, Lord Eldon, and address themselves earnestly to the acquisition of the doctrines of the Common Law, and the practice of its Courts. Those who will not do so, may, unless blessed with first-rate abilities, and superior opportunities of displaying it, cease to contemplate attaining the heights of their profession; and content themselves with occupying the humbler, but still useful, sphere of the *hewers of wood and drawers of water*.

The demeanour of Equity Counsel, in the conduct of business, is generally characterised by a quiet courtesy and calmness, which it is difficult always to preserve amidst the irritating incidents, and fiercer collisions, of Common Law litigation, particularly at Nisi Prius. If they do not require our keenness and energy, we may nevertheless imitate with advantage those qualities of

theirs which will be apparent to any one paying even the briefest occasional visit to their Courts.

According to the Law List, nearly five hundred of the two thousand five hundred members of the Bar, are Equity Counsel : but it is believed that not more than two-thirds of the number are actual practitioners. It may be added, that the leading Common Lawyers appear much more frequently in the Equity Courts, than the members of the latter present themselves in the Common Law Courts. Many of the greatest Equity cases have, of late, been led by Common Lawyers; while the appearance of Equity lawyers in Common Law Courts is confined to a few of the cases of conveyancing questions sent by the Equity Courts for argument in those of Common Law ; on which occasions Equity Counsel generally acquit themselves very ably. The BANKRUPTCY Courts are attended indifferently by members of the Equity and Common Law Bar—those of the latter, as well as, recently, of the *Insolvent* Court, being frequent attendants before the Courts of the Commissioners : principally on account of their familiarity with the practice of *vivd voce* examination and cross-examination of witnesses. This is, upon the whole, a lucrative branch of practice—at all events, in bankruptcy cases of importance.

In order to succeed at the Equity Bar, patience, a power of sustained attention, and clear-headedness, are the principal requisites. There is little, if any, room for the display of humour, wit, eloquence, or diversified acquirement, in a small court, where the only person addressed is a single judge ; the audience, ‘fit though few,’ consisting of Equity Barristers, solicitors, and one or two listless visitors ; the topics discussed, moreover, almost always concerning *property* only. There are neither jury nor witnesses to operate upon—in fact, none of the materials or opportunities for

excitement, or rhetorical display.—A leading feature of Equity proceedings being the necessity of having before the Court *all parties* who may be materially affected by its judgments, in order that a COMPLETE DECREE may be pronounced, there are few suits which do not require the employment of various counsel to represent, sometimes, however, only formally, the different parties. It is quite amusing to be in Court on such occasions. On a particular 'cause' being mentioned, up start some six, ten, a dozen, or twenty counsel, as if his Lordship—*pace tanti viri*!—or his Honour were sitting before an opened piano, and had occasioned a sudden uprising and commotion among the *hammers* behind, by placing his fingers on the keys of this legal instrument!—In a certain late case of *Lee v. Pain*, the author has been informed that there were engaged between forty and fifty counsel!

Laboriously monotonous as are generally the functions of the Equity practitioner, he is yet consoled by the consciousness of being concerned in the most important and lucrative kind of litigation going forward in the country. Nor has he to go that round of incessant physical and mental fatigue to which the Common Lawyer is condemned. The Equity counsel has rarely if ever to attend, even as leader, or when in first-rate junior Court practice, evening consultations; and, above all, is exempt (except so far as he may choose to follow the advice of Lord Eldon) from the expensive misery of going circuit.

If the student should have originally determined upon going to the Equity Bar, he ought to place himself first with a Conveyancer for a couple of years; then with a Common Law Pleading Barrister, or Pleader in extensive practice, for a year; and finally with an Equity Draftsman for a couple of years. If time or money be an object, let him

spend two years with a Conveyancer, six months with a Pleader or Pleading Barrister (if he can prevail on any to take him for so short a period), and twelve months with an Equity Draftsman. In the latter case, however, we warn him that superior abilities, indefatigable industry, and inflexible determination, are indispensable, in order to overcome the serious disadvantages of deficient legal education.

If a student, on entering into the profession, be uncertain whether to adopt the Equity, Common Law, or Conveyancing department, he should spend his first year in the chambers of a Conveyancer—being specially careful to select one who, with a sufficient amount of business, will also devote a certain portion of the day to *reading* with him, and fully explaining the nature of the business transacted in chambers. If at the year's end still uncertain, let him spend the next year with a Common Law or Equity barrister, according to his stronger inclination towards the one, than towards the other branch of practice; after which, he must judge and act for himself, consulting the most able and experienced persons to whom he may have access.

To assist him in making his election, and a prudent disposition of his subsequent time and exertion, the student should, after having spent a year in chambers, go into the Common Law and Equity Courts, and pay very close attention to what goes on, in order to discover which of the two Bars appears more agreeable and suitable to his own capacity and inclination. A Common Law Court *in banc*, resembles a Court of Equity, too closely to afford an illustration of the real contrast between the two departments. That will be afforded decisively and effectually by a week or fortnight's attendance at *Nisi Prius*.

There are three works which may be recommended to

the student, on the subject of Equity Jurisprudence generally, and of Equity Pleading.

First, that of Mr. Justice Story, in two octavo volumes, entitled "COMMENTARIES ON EQUITY JURISPRUDENCE ;" * which contain the essence of the best English Equity books extant, with many interesting and valuable illustrations afforded by the American administration of Equity. The second is the forthcoming work of Mr. Spence, Q.C., a learned and leading practitioner at the Equity Bar, who thus announces his important undertaking :—"A Treatise on the Rise and Establishment of "the Jurisdiction of the Court of Chancery, and the Principles of its Equitable Jurisdiction, in which the work "of Mr. Maddock will be incorporated, with a view to the "elucidation of the main subject. This work will contain "a summary of the leading doctrines of the *Common Law* "of England, particularly as respects property, with an "attempt to trace them to their sources. Also, a short "account of the rise and establishment of the superior "Courts of Common Law, and the nature of their jurisdiction ; particularly noticing the defects and inconveniences of the Common Law and the mode of its administration, which the Court of Chancery has from time "to time interfered to supply or redress." If Mr. Spence's professional engagements should admit of his completing, with due accuracy, a work of this elaborate and comprehensive character, he will have conferred a lasting service upon his profession. This gentleman's qualifications for the task are undoubtedly great. To say nothing of his long practical experience, he is the author of the valuable "Inquiry into the Origin of the Laws and Political

* Reprinted by Maxwell, Bell Yard, London, under the sanction and direction of the Author. The last edition (the second) was published in 1839.

Institutions of Modern Europe, particularly those of England," which, but for an unaccountable oversight, would have been recommended to the student in the seventh chapter of this work.—(*Vide ante*, pp. 250, 252).—The *third* work is the late Lord Redesdale's Treatise on Pleadings in the Court of Chancery, to the pre-eminent merits of which, has been placed on record the following striking testimony by two consummately-qualified judges. "It is a wonderful effort to collect," said Lord Eldon, C., in *Lloyd v. Johnes*, 9 Ves. 54, "what is to be deduced from authorities, speaking so little, what is clear. And the surprise is, not from the difficulty of understanding all that he has said; but that so much can be understood." Sir Thomas Plumer, also, in the celebrated case of *Cholmondley v. Clinton*, 2 Jacob & Walker, 151, expressed himself in the following terms of splendid eulogy:—"To no authority, living or dead, can reference be had with more propriety, for correct information respecting the principles by which Courts of Equity are governed, than to one whose knowledge and experience enabled him, fifty years ago, to reduce the whole subject to a system, with such an universally acknowledged learning, accuracy, and discrimination, as to have been ever since received by the whole profession as an authoritative standard and guide." Mr. Walpole, of the Equity Bar (a relative of Lord Redesdale's), in one of his valuable Lectures on Equity, at the Law Institution, and which, it is to be hoped, will one day appear in print, made the following interesting statement concerning the work in question:—

"I cannot refrain from adding, as the greatest encouragement to all of you who are just commencing your professional career, that Lord Redesdale's Treatise on Pleading

was written by a man who had been trained in a solicitor's office; but by study and persevering industry, *æquabiliter et diligenter* (as his own motto describes it), rose to be Lord Chancellor of Ireland. It was composed, moreover, not for ambition, or for profit, but simply, in the course of his duties, for the education of another man, at that time only his pupil, and who profited so greatly by its profound learning, and gained from it such a thorough knowledge of sound principles, that not long after the retirement of his gifted instructor, that pupil succeeded him in the same distinguished office. I mean the present Lord Manners."

The author has now, to the best of his ability, exhibited a complete *popular* view of the nature of Equity, as administered in this country, and the nature of its relation to *Law*; with a view to enabling students to decide for themselves which of the two departments they will select; and to demonstrate the necessity of the practitioner in either of them, acquainting himself with the principles and practice of the other. We shall conclude the whole matter, by laying before the reader two passages relating to this subject—one by that distinguished living master of Equity, the present Lord Chancellor of Ireland (Sir Edward Sugden)—and the other by the late Lord Eldon.—First, Lord Chancellor Sugden.

"As the law of property is now administered in the different forms of Law, and Equity, in this country, allowing for the imperfection of all human laws, it exhibits a splendid and comprehensive code of jurisprudence; and that man will deserve ill of his country who shall ever attempt to confound the rules by which the Courts of Law, and of Equity, are severally guided."*

* *A Series of Letters to a Man of Property, on Sales, Purchases, Mortgages,*

Then Lord Chancellor Eldon,—“ Lord Chief Justice De Grey said, that he never liked Equity so well, *as when it was like Law*. On the day before, I had heard Lord Mansfield say, that he never liked Law so well, *as when it was like Equity*: remarkable sayings of those two great men, which made a strong impression upon my memory.” *

Here follows Lord Chancellor Eldon’s Advice to a Student for the Equity Bar, in the year 1807. We give it entire, out of reverence for everything which fell from so great an authority; but the student will bear in mind, while perusing it, the revolution which has been effected in real property law, since the letter, from which the ensuing passage has been taken, was written. It is to be found in the second volume of Mr. Twiss’s Life of Lord Eldon, pp. 51, 52; and is the letter to which reference has already been made in the preceding chapter. (*Ante*, pp. 279, 280.)

“ I approve altogether the idea that such of you as look towards the Court of Equity, should go, and for a good many years, the Northern circuit, as well as he who makes the profession of the Common Law his peculiar study; and I approve also the plan that the Equity Barrister should go to Mr. Abbott [afterwards Lord Tenterden] for twelve months. I know, from long personal observation and experience, that

Leases, Settlements, and Devises of Estates, by EDWARD BURTENSHAW SUGDEN (1821), pp. 4, 5. “ Lord Mansfield,” he observes in the paragraph from which the above passage is extracted, “ was unhappily too prone to administer Equity in a Court of Law. The landmarks of the law of real property received a severe shock in his time; and it is painful to reflect, that although his successors have now subverted the principle of nearly every important decision pronounced by him on the law of property, yet during the period for which he was Chief Justice of England, there was scarcely a difference of opinion in the court where he presided, so implicitly were his equitable principles adopted.” See this topic discussed *ante*, p. 303.

* Lord Eldon, C., in *Dursley v. Fitzharding Berkeley*, 6 Vesey, 260.

the great defect of the Chancery Bar, is its ignorance of Common Law, and Common Law practice; and, strange as it should seem, yet almost without exception it is, that gentlemen go to a Bar where they are to modify, qualify, and soften the rigour of the Common Law, with very little notion of its doctrines or practice! Whilst you are with Abbott, find time to read Coke on Littleton, again and again. If it be toil and labour to you, and it will be so, think as I do when I am climbing up to Swyer or to Westhill,* that the world will be before you when the toil is over; for so the Law will be if you make yourself complete master of that book. At present lawyers are made good cheap, by learning law from Blackstone, and less elegant compilers; depend upon it, men so bred will never be lawyers (though they may be barristers), whatever they call themselves. *I read Coke on Littleton through, when I was the other day out of office*; and when I was a student I abridged it. To a Chancery man, the knowledge to be obtained from it is peculiarly useful in the matter of TITLES. If you promise me to read this, and tell me when you have begun upon it, I shall venture to hope that, at my recommendation, you will attack about half a dozen other very crabbed books, which our Westminster Hall lawyers never look at. Westminster Hall has its loungers as well as Bond Street. Before you allow yourself to think that you have learnt Equity pleading with your Chancery pleader, remember to make yourself a good Conveyancer in theory and practice. I venture to assure you, without qualification upon the positiveness with which I assure you, that, if you are such, you will feel yourself in the Court of Chancery vastly above your fellows. This I know, from my own personal experience, that being, by

* High grounds at Encombe [Lord Eldon's seat], commanding extensive views.

the accidents of life, thrown into a Conveyancer's office, I have never known, in a long life in Chancery, how sufficiently to value the advantages that circumstance has given me. When you are learning to draw Equity pleadings, you may be learning this also in your father's office.* But you must labour at it till you can speak and dictate conveyances of every species, and this can be learnt only by going through the drudgery of copying. I wrote some folio books of Conveyances, and I strongly advise you to do the same. The Conveyancing precedents have been formed and modelled so as to make all their provisions square with the rules of law, as modified by decisions in Equity; and, unless I deceive myself, after you have enabled yourself to dictate the different species of Conveyances, and by that time have thought that it was a mere work of dull serious attention, you will find that, from and after that moment, you will read no Chancery case, nor hear any Chancery decision, which will not appear to illustrate and open the meaning of all the phraseology, dull and technical as it may seem, of the Conveyancer's language. This is a point I am very strenuous about. After all, when tolerably well furnished, you have begun your Chancery practice, go, spring and summer, for some years, the circuit. That practice will keep alive your Common Law knowledge, and will enable you to improve in your knowledge of Equity. But it hath besides many mighty advantages, both for the time, and in future life. On the recommendation of great men, now no more, I followed it, till it became injustice to my Equity clients." †

* The father of the young gentleman to whom this letter was addressed was Mr. Farrer, an attorney in London, of considerable practice.

† Twiss's *Life of Lord Chancellor Eldon*, vol. ii. pp. 51—2.

CHAPTER X.

DEPARTMENTS OF THE PROFESSION—

I. CIVIL DEPARTMENT.

PART II.—COMMON LAW.

DURING our long sojourn in the domains of EQUITY, we have made so many excursions into the conterminous territory of the COMMON LAW, that with its outskirts, at least, we have become already tolerably familiar. We must now, however, proceed into the interior of this venerable country; stimulated by a just anxiety to become acquainted not only with—so to speak—its geographical features, but the characters and occupations of its inhabitants.

“No unbiassed observer,” says Mr. Hallam, in opening the eighth chapter of his instructive “View of the State of Europe during the Middle Ages,” * “who derives pleasure from the welfare of his species, can fail to consider the long and uninterruptedly increasing prosperity of England, as the most beautiful phenomenon in the history of mankind. Climates more propitious may impart more largely the mere enjoyments of existence; but in no other region have the benefits which political institutions can confer, been diffused over so extended a population; nor have

* Vol. ii. pp. 374—5 (5th ed.)

any people so well reconciled the discordant elements of wealth, order, and liberty. These advantages are surely not owing to the soil of this island, nor to the latitude in which it is placed; but to the SPIRIT OF ITS LAWS, from which have been derived, through various means, the characteristic independence and industriousness of our nation. The constitution, therefore, of England must be, to inquiring men of all countries, but far more to ourselves, an object of superior interest; distinguished especially as it is from all free governments of powerful nations which history has recorded, by its manifesting, after the lapse of several centuries, not merely no symptom of irretrievable decay, but a more expansive energy. Comparing long periods of time, it may be justly asserted, that the administration of government has progressively become more equitable, and the privileges of the subject more secure; and though it would be both presumptuous and unwise to express an unlimited confidence as to the durability of liberties which owe their greatest security to the constant suspicion of the people; yet, if we calmly reflect on the present aspect of this country," [Mr. Hallam wrote this more than twenty years ago,] "it will probably appear that whatever perils may threaten our constitution, are rather from circumstances altogether unconnected with it, than from any intrinsic defects of its own."

It is to the COMMON LAW, venerable and glorious, notwithstanding its unquestionable imperfections, assisted, as it has been, from time to time, by the Legislature, that Englishmen are indebted for the advantages thus eloquently enumerated. Much mistrusting our powers of doing anything like justice to so interesting and important, but difficult, a subject, we shall endeavour to give such a

plain and popular account of it, as may serve at once to excite some little interest in the student, and afford him practical information; and, as far as the public are concerned, to correct prevalent errors and misconceptions.

The MEANING of the term "Common Law," even among lawyers, is sufficiently ambiguous—the expression being used in various senses, according to the objects with which it is contrasted—it being so contradistinguished, sometimes from the statute law; sometimes from the civil and canon law; occasionally from the *law-merchant* (*lex mercatoria*); and frequently from Equity—which, on the other hand, is by some regarded as itself merely a sort of secondary Common Law.* Many use it to designate simply a law 'common' to all the realm. It is also sometimes adopted in opposition to 'Criminal Law;' but we beg the student to bear in mind throughout this work, that *we* use the word "Criminal Law" merely for convenience' sake: the Common Law of the land, of course, including all the Criminal Law which is not of positive statutory origin.—Still greater uncertainty exists, and much controversy has arisen, concerning the ORIGIN of this Common Law.—We shall, in this chapter, endeavour to assign a definite meaning to the term "Common Law": to resolve that law into its principal elements: to indicate the true method of its growth, development, and application to the varying exigencies of society: and describe the Courts in which, and the persons by whom, it is administered. We shall then explain the general nature and result of that great legislative and judicial operation by which it has been lately reformed and remodelled; and conclude with a brief outline of its existing state.

* Burton's Elem. Comp. § 9; and *post*, p. 438 (n.)

"Our English lawyers," observes Mr. Hallam,* "prone to magnify the antiquity, like the other merits, of their system, are apt to carry up the date of the Common Law, till, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient time: Sir Matthew Hale not hesitating to say that its origin is as undiscoverable as that of the Nile!" It would be equally perplexing and unsatisfactory to the student, to parade before him the various speculations and controversies upon this subject, which lie scattered over some twenty volumes now lying open around the writer of these pages. Suffice it to observe, that if the reader be moderately well acquainted with the early history of his country, proofs will accumulate upon him, as he advances in the scientific study of his profession, of the very composite character of the Common Law. He will find indubitable evidence, that some parts of it have been handed down to us from Saxon times; that a far greater portion has been derived from our Norman forefathers; that the Roman law bears a much greater proportion to the other ingredients of the Common Law, than the jealous professors of the latter have been, even in recent times, willing to admit; and that some of its most disfigured portions bear the deep traces of that scholastic philosophy,† which at so early a period, and for so long a time, retarded the advance of knowledge of every kind.‡ That our ancestors were,

* *Midd. Ages*, vol. ii., p. 465 (5th ed.) † *Ibid.* pp. 468—9 (5th ed.)

‡ Blackstone has the following passage, occurring towards the close of his "Introduction," [vol. i. p. 35].—"The originals of our law should be traced to their foundations, as well as our distance will permit:—to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus;—to the codes of the Northern nations on the Continent, and more especially to those of our own Saxon princes;—to the rules of the Roman Law, either

under the first princes of the Norman line, engaged in frequent struggles to maintain certain institutions known by the name of *The Laws of Edward the Confessor*, is indisputable,* however doubtful may be the origin, form, and character of these laws,—which, in all probability, were little else than a digest by Edward, of the Mercian, West Saxon, and Danish laws then existing and in force in different parts of the kingdom.† It may upon the whole be received as generally true, that our Common Law traces its origin to the early usages and customs of the Aboriginal Britons, and was necessarily augmented, in different ages, by the admixture of some of the laws and usages of the Romans, the Picts, the Saxons, the Danes, and the Normans, who spread themselves over the country: “our laws,” says Lord Bacon, “becoming as mixed as our language.” The Common Law was feeble and narrow at first; but expanding with the exigencies of society, and with the progress of knowledge and of refinement, it has at length become a remarkably complex and intricate system; presenting, as will presently appear to the reader, a singular combination of the strict principles of the old feudal law, with the elegant reasonings of public and commercial jurisprudence, which are so universally admired for their general equity.‡ Of such a gradual formation and expansion is, unquestionably, the law of all civilised countries. The Roman, or Civil Law, is made up not merely of the positive legislation of the

left here in the days of Papinian, or imported by Vacarius and his followers; —but above all, to that inestimable reservoir of legal antiquities and learning, the feudal law.”

* 1 Steph. Comm. 43.

† Hale's Hist. of the Comm. Law, c. 3; 1 Bla. Comm. 64—5.

‡ Eneyc. Americana, vol. iii. p. 394; and *vide post*, pp. 406, 407.

Senate and the people, and the edicts of the Emperor, but also of the decrees of courts of justice, of the opinions of learned jurists, and of the silent, but irresistible, usages of the people, in the arrangements of their social and domestic policy. These *usages*, at first voluntary and arbitrary, gradually acquired the force of *customs*, which tradition made to operate as laws to regulate like concerns in other ages : and as they were generally founded on public convenience, they were adhered to, first from habit, and at last from an anxious desire, natural to all governments, to profit by the experience of the past, and to fix rights by some certain rules coinciding with the existing state of the people.*

To the eye of one moderately instructed in early English history, our law presents a strangely chequered appearance, fully justifying the beautiful and picturesque comparison of Blackstone. † “It resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.” ‡ How

* Encyc. Americana, vol. iii. p. 394.

† 3 Comm. 266.

‡ This graphic passage seems to have suggested to Paley, a few years after the death of Blackstone, the following admirable illustration of our Constitution :—“The Constitution of England, like that of most countries of Europe, hath grown out of occasion and emergency : from the fluctuating policy of different ages ; from the contentions, successes, interests, and opportunities, of different orders and parties of men in the community. It resembles one of those old mansions, which, instead of being built all at once after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art ; has been altered from time to time ; and has been continually receiving additions and repairs, suited to the taste, fortune, and conveniency, of its succes-

much the force of the last observation has been abated by the recent alterations in the law, will appear by-and-by, and has been already alluded to.* The essence of the Common Law consists of maxims and customs which have been in use, from time whereof the memory of man runneth not to the contrary; it is this circumstance which gives them their weight and authority. We have already alluded to the similarity of the origin of our Common Law, and that of Rome. Sir James Mackintosh,† in the following passage, has given such an interesting and masterly account of the nature and progress of the Common Law, that we shall present it entire to the student.

"The consuetudinary, or COMMON LAW, consists of certain maxims of simple justice, which we are taught by nature to observe and enforce, blended with certain ancient usages, often in themselves convenient and equitable, but chiefly recommended by the necessity of adhering to long and well-known rules of conduct.

"The progress of our Common Law, till the reign of Edward I., bears a strong resemblance to that of Rome. The primitive maxims and customs were applied to all new cases, which, appearing similar to them, it was natural and convenient to subject to like rules. Courts in England, private lawyers, juridical writers, and absolute monarchs at Rome, in delivering opinions concerning specific cases, extended the analogy from age to age, until an immense fabric of jurisprudence was at length built upon somewhat

sive proprietors. In such a building we look in vain for the elegance and proportion, for the just order and correspondence of parts, which we expect in a modern edifice; and which external symmetry contributes, after all, much more perhaps to the amusement of the beholder, than to the accommodation of the inhabitants."—*Moral and Political Philosophy*, Book VI. c. vii.

* *Ante*, pp. 20 *et seq.*

† *Hist. of England*, p. 274.

rude foundations. The Legislature itself occasionally interposed to amend customs, to widen or narrow principles : but these occasional interpositions were no more than petty repairs in a vast building. From the reign of Edward I., we possess the YEAR-BOOKS,—annual notes of the cases adjudged by our courts, who exclusively possessed the power of authoritative interpretation, scarcely to be distinguished from the legislation which the tribunals of Rome shared with the imperial ministers, and with noted advocates. [*Edicta Prætoris, Rescripta Principum, Responsa Prudentum.*] In a century after him, elementary Treatises, methodical Digests, and works on special subjects, were extracted from these materials, by Lyttleton, Fortescue, and Brooke. So conspicuous a station at the head of the authentic history of our uninterrupted jurisprudence, has contributed, more than his legislative acts, to procure for Edward the ambitious name of the English Justinian. The science of law, which struggles to combine inflexible rules with transactions and relations perpetually changing, can obtain no part of its object, without the exercise of more ingenuity, and the use of distinctions more subtle, than might be deemed suitable to the regulation of practice. In time, the lawyers, who were commonly ecclesiastics, were still further warped by the excessive refinements of the scholastic philosophy, which had reached its zenith under Aquinas, and seemed to have over-shot it in the hands of his disciple and antagonist, Duns Scotus. A proneness to uninformative acuteness, and to distinctions purely verbal, tainted it from the cradle. * * It is difficult not to admire the logical art with which by the system of pleading, *fact* is separated from *law*, and the whole subject of litigation reduced to one, or a few points,

on which the decision must hinge. It has been the ancient and unremitted complaint of the most learned lawyers, that it has been overloaded with vain and unprofitable subtleties, which, in the eager pursuit of an ostentatious precision, has plunged it into darkness and confusion. We are now [he was writing about fifteen years ago] labouring to systematise what the experience of our ancestors has collected, and to unite it with more simplicity and clearness."

The term "Common Law," as we have already intimated in this chapter,* is used in various senses, by different writers, principally with reference to the objects from which it was desired to distinguish it. The following definition of it, by Chancellor Kent,† appears to us to be at once the most terse, comprehensive, and satisfactory of any which we have seen:—"The Common Law includes, those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." This at once points to the grand distinction between Common Law and Statute Law; the latter being "the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.‡ The one is written law (*lex scripta*); the other un-written law (*lex non scripta*.) This distinction between written and unwritten laws, we have adopted from the Romans, who, in their turn, had borrowed it from the Greeks, as we learn from the first book of the Institutes of Justinian. (Lib. I. Tit. II. §§ 3, 9, 10.) 'Constat autem jus nostrum, quo utimur, aut *scripto*, aut

* *Ante*, p. 396.

† 1 Kent, Comment. 468.

‡ *Id.* p. 447.

sine scripto : ut apud Græcos τῶν νομῶν οἱ μὲν ἐγγράφοι,-- οἱ δὲ ἀγραφοί. *Scriptum est, lex, plebiscitum,* etc. etc. '*Sine scripto jus venit, quod usus approbavit* : nam diuturni mores, consensu utentium comprobati, legem imitantur. Et non ineleganter in *duas* species jus civile distributum esse videtur : nam origo ejus ab institutis duarum civitatum Athenarum, scilicet, et Lacedæmoniorum fluxisse videtur. In his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem ea, quæ pro legibus observabant, memoriæ mandarent : Athenienses, vero, ea, quæ in legibus scripta comprehendissent, custodirent.'—To return, however. In thus distinguishing our own laws into the *scriptas*, et *non scriptas*, we use the latter in a peculiar and restrained sense ; signifying by it nothing more than that the ORIGINAL INSTITUTION AND AUTHORITY of the law are not set down in writing, as is the case with Acts of Parliament ; but that it receives its binding power, as a law, from long and immemorial usage, and universal reception throughout the realm.* It has been said by one of our judges (Chief Justice Wilmot †) that the Common Law is *nothing else* than statutes anciently written, but which have been worn out by time ; and that *all* the law began by the consent of the legislature. This is, however, a hasty assertion, and cannot possibly be supported. A great proportion of the rules and maxims which constitute the immense code of the Common Law, grew into use by gradual adoption, and received from time to time the sanction of the Courts of Justice, undoubtedly without any legislative act or interference whatever ; being simply the application of the dictates of natural justice, and of cultivated reason, to

* 1 Bla. Comm. 64.

† Collins v. Blantern, 2 Wils. 348.

particular cases.* It is, at the same time, however, highly probable that, as Sir Matthew Hale† has observed, ‘*many* of those things which now obtain as Common Law, had their origin by Parliamentary Acts, or constitutions made in writing, though those acts are now either not extant, or, if extant, were made before time of memory; and the evidence of the truth thereof will easily appear, for that in many of those old acts, yet extant, we may find many of these laws enacted, which now obtain merely as Common Law, or the general custom of the realm; and were the rest of these old laws extant, probably the footsteps of the original institution of many more laws which now obtain merely as Common Law, or customary laws by immemorial usage, would appear to have been at first statutes, or Acts of Parliament.’ The student, then, will understand, that when the Common Law is called ‘the *unwritten* law,’ he must not conceive that it is, at present, merely *oral*, and transmitted from age to age by word of mouth. In the dark ages, indeed, amidst the general ignorance of the times, few laws were reduced into writing; and still fewer of their maxims and customs were to be found in books or manuscripts. In the infancy of our own Common Law system, judicial decisions rested solely on the oral testimony of the *suitors*, or *witan*, who bore witness to the judgments which they or their predecessors had pronounced.‡ They remembered, and *recorded* them. In progress of time their judgments were committed to writing as “*records* of court,§” and to give them greater

* 1 Kent, Com. 469.

† Hist. Com. Law (by Runnington), p. 3.

‡ Rise and Prog. Eng. Commonw., by Palgrave, p. 1. c. iv. p. 145.

§ ‘So called,’ says Coke (3 Inst. 71), ‘for that they record or bear witness of the truth.’ See 1 Mart. Convey. 9.

publicity, they were at length put forth periodically in the shape of **REPORTS**: of which a regular series is extant, in print, from the reign of Edward III. inclusive.* “English jurisprudence,” says Edmund Burke, “has not any other sure foundation, nor, consequently, have the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridically traditionary line of decisions, contained in the notes taken, and from time to time published, mostly under the sanction of the judges, called *Reports*.”† Thus it comes to pass, that the *monuments* and *evidences* of our legal customs are contained in the records of our Courts of Justice; in books of reports and judicial decisions; and also in certain Treatises of learned sages of the profession, preserved and handed down to us from times of the highest antiquity.‡ The authenticity of these customs, rules, and maxims, rests entirely upon *reception and usage*, as declared by our judges, who are the sworn depositaries and interpreters of our law.§ This Common Law is properly distinguishable into three kinds. I. *General* customs, or those applicable to and governing the whole kingdom. II. *Particular* customs, *i.e.*, affecting the inhabitants of particular districts only. These are probably the remains of a multitude of local customs prevailing, some in one part and some in another, over the whole of England, while it was broken into distinct dominions; and out of which, after it had become a single kingdom, our Common Law was collected and made applicable to the realm at large, each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of the same

* 4 Coke's Inst. 5.

† Works, vol. xiv. p. 332.

‡ 1 Bla. Comm. 63.

§ *Id.* p. 68—9.

uniform and universal system of laws; but, for reasons now long forgotten, particular counties, cities, towns, manors, and lordships, are indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; such privilege being confirmed to them by several Acts of Parliament. * III. The *Civil* and *Canon* Law, which derive no force, weight, or authority whatever, *quà* Civil or Canon Law, from the fact of their being in writing, or otherwise intrinsically binding; but solely because they have been admitted and received by immemorial usage and custom in some particular places, and some particular courts, and so form a portion of our *customary* law; or because they are sometimes introduced by consent of Parliament; in which case they owe their validity to the *lex scripta*, or Statute Law. They are, in fact, only subordinate laws—*leges sub graviore lege*—and as restrained, altered, new modelled, and amended, are by no means with us a distinct independent species of laws, but inferior branches of our Common Law,—properly denominated the Ecclesiastical, Military, Maritime, and Academical Laws of this realm.† Our ‘Common Law’ now comprehends, under the first of the above three heads, the Law of Nations, and the Law Merchant, which, as we have already intimated, ‡ have been gradually engrafted into it, as we increased our intercourse and transactions with other countries. We have, for the most part, borrowed them from the general usages of merchants, in the commercial nations, which, upon the revival of commerce and

* Magna Charta, 9 Hen. III. c. 9; 1 Ed. III. stat. 2, c. 9; 14 Ed. III. stat. 1, c. 1; 2 Hen. IV. c. 1; and see 1 Steph. Comm. p. 53.

† Hale's Hist. of the Comm. Law, c. 2; 1 Bla. Comm. 54; 1 Steph. Comm. p. 66.

‡ *Ante*, p. 398.

of letters, inhabited the shores of the Mediterranean. The law, for instance, of *foreign bills of exchange*, of *insurance*, and of *general average*, is of comparatively recent adoption in England, and cannot be traced back to any very remote period in our annals. The Law of Insurance, indeed, has grown up (as we formerly explained*), together with the bulk of our commercial Law, since the time when Lord Mansfield became Chief Justice of England, in the year 1756. From the above general observations, coupled with what was advanced in the preceding chapter, the student can now, it is to be hoped, annex tolerably accurate and definite notions to the following expressions:—that for such and such an injury, the remedy is at Common Law; or is given by statute; or must be sought for in a Court of Equity.

We may here mention that our Common Law constitutes the *general basis* of the jurisprudence of all the United States of America (except that of Louisiana, where the Civil Law prevails). There is, however, one important reservation to be made, namely, that the *second* of the three ingredients of our Common Law, above explained, (*viz.*, particular customs,) does not exist in America; which has no local or provincial law existing in any particular county or district of any State, or contradistinguished from that which prevails in the State at large. There are, again, certain important portions of our general Common Law, which have never been introduced into, or recognised in, the United States, *viz.*, our Ecclesiastical Law, and all those branches, *e. g.* tithes, advowsons, &c., growing out of it; there being no Established Church in the

* Page 33.

United States. Such portions only of our Common Law, in short, as were adapted to the situation of the colonies at their first settlement, and were thence afterwards used and recognised, are (with the above exceptions) now of force in the United States. The Americans also consider as part of their Common Law, those statutes in amendment of the Law which had been made before the emigration of their ancestors from this country; and such of our statutes passed subsequently to that period, as they choose to adopt and incorporate as amendments of the Law. It should also be observed that many of the fundamental principles of our Common Law have been altered, modified, and annulled by the positive legislation of the various States; so that though the *general basis* is the same, there are almost infinite shades of difference in the actual jurisprudence of the different States.*

What then may be regarded as the component parts of this Common Law? Some portions of it can be pretty clearly traced to a SAXON origin. It would be here out of place to enter into detailed proof of this assertion. The reader is therefore referred to Mr. Sharon Turner's History of the Anglo-Saxons, particularly to his "History of the Laws of the Anglo-Saxons," forming the Appendix (No. III.) to the first volume of that work (ed. 1839), p. 505. Mr. Hallam is of opinion that "some features of the Common Law may be distinguishable in Saxon times;"† and a few other ingenious and learned writers have contributed additional evidence of the Saxon origin of our laws. It does not, however, tend to invalidate the statement of Mr. Hallam, that "while our limited

* 1 Kent, Com. 472, 3., Encyc. Americ. p. 395.

† Midd. Ages, vol. ii. pp. 465, 6.

knowledge prevents us from assigning many of the peculiarities of the Common Law to any determinable period, yet the general character and most essential parts of the system were of much later growth:"* and he is "inclined to ascribe our present Common Law to a date not much antecedent to the publication of *Glanville*"†—i. e. in the reign of Henry II., *circa* A. D. 1181.

But it is to our NORMAN ancestors that we are indebted for a far greater portion of the Common Law. Our system of *Tenures*, for instance, was chiefly constructed, if not introduced, by William the Conqueror. Our judicial forms and proceedings, while they have nothing in common with the Anglo-Saxon style, are in striking conformity with the Norman; and it has been remarked, with great truth, that the general language of our jurisprudence and its terms of art, are exclusively of French extraction.‡ But the third and perhaps greatest source of our Common Law is, undoubtedly, those large portions of the Civil Law which were incorporated with it, from as early a period as that of the subjugation of this island by the Romans. To this subject we have alluded in the seventh chapter of this work, pp. 245, *et seq.*, to which we refer the student for a general account of the matter.

It is admitted by Sir Matthew Hale§ that the Common Law was greatly improved during the reign of Henry III., in the time of Bracton, who was chief justice during that monarch's reign. "This improvement," said Best, C. J., (the late Lord Wynford) in delivering judgment in the House of Lords, in the case of *Giffard v. Lord Yarborough*,

* Midd. Ages, vol. ii. pp. 465, 6.

† *Id.* p. 468.

‡ See 1 Stephen's Comm. p. 44, and the authorities there cited.

§ Hist. of the Comm. Law, c. vii.

5 Bingham 167, "was made by incorporating much of the Civil with the Common Law. We know that many of the maxims of the Common Law are borrowed from the Civil Law, and are still quoted in the language of the Civil Law. Notwithstanding the clamour raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been adequate to form a system of law sufficient for the state of society in the time of Henry III. Both Courts of Justice and Law writers were obliged to adopt such of the rules of the Civil Law as were not inconsistent with our principles of jurisprudence." Mr. Spence, in his "Inquiry into the Origin of the Laws of Modern Europe," has a passage to the same effect.*

"The forms of alienation and disposal of property [among the Anglo-Saxons], particularly by will, were almost universally adopted by the barbarians from the Romans. In regard to commercial transactions in general, there is every probability that the ancient Roman laws were not disturbed by the Continental barbarians. Indeed, the laws relating to *contracts*, to be found in their codes and collections of capitularies, are almost entirely Roman. The predatory habits of the Anglo-Saxons, for years after their settlement in Britain, rendered it necessary that particular laws should be enacted in regard to the sale of cattle, and other moveable property. Little beyond this is to be found in their codes on any subject connected with mere civil legislation. What laws in regard to contracts in general existed amongst them,—and some there must have been, as commerce was carried on between many towns to a con-

siderable extent—were preserved by tradition in London, and the other trading towns throughout the kingdom. Bracton, in the reign of Henry III., took the pains to set down in writing these unwritten laws and customs; and so little had they departed from their Roman originals, even after the lapse of many centuries, that he found that they might, with trifling variation, be expressed in the very terms of the Institutes and the Digest of Justinian.”

The extent to which the Civil Law has been incorporated with the Common Law has been attested by Chief Justice Holt and Sir William Jones. The former declared, in the case of *Lane v. Cotton*, 12 Mod. 482, “that the principles of our law are borrowed from the Civil Law, and therefore in many things grounded on the same reason.” The latter* has remarked, “that though few English lawyers dare make such an acknowledgment, yet the Civil Law is the true source of nearly all our English Law that is not of feudal origin.”

The reason of this obstinate reluctance on the part of our ancestors, to acknowledge the obligations of our Common Law to that of Imperial Rome, is well known to the merest tyro in English history; and, it need hardly be said, has long ceased to be justified by the circumstances of the country. The bishops and clergy, in early times, many of them foreigners, applied themselves wholly to the study of the Civil and Canon Laws; while the nobility and laity adhered with equal pertinacity to the old Common Law: ‘both of them,’ says Blackstone,† ‘reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite

* See Lord Teignmouth's *Life of Sir W. Jones*, vol. ii. p. 168.

† 1 Comm. 19.

system that real merit which is abundantly to be found in each.' Upon this Mr. Christian makes a sensible observation. "Though the Civil Law, *in matters of contract and the general commerce of life*, may be founded in principles of natural and universal justice, yet the *arbitrary and despotic maxims* which recommended it as a favourite to the Pope and Romish clergy, rendered it deservedly odious to the people of England. *Quod principi placuit legis habet vigorem* (Inst. I., 2, 6)—the Magna Charta of the Civil Law—could never be reconciled with the *judicium parium, vel lex terræ*." At the present day, however, the noble reasonings and principles of the Civil Law on the subject of private rights and wrongs, are continually cited in our courts—"not being acknowledged," to adopt the language of Lord Stair, speaking of its reception in the Law of Scotland,* "as a law binding for its authority, but being followed, as a rule, for its equity."

One of the most interesting cases, lately brought before the Common Law Courts, was that of *Acton v. Blundell*, 12 Mee. & Welsb. 324, decided, in Error, in the Exchequer Chamber, in the year 1843. The question there was one of novelty, interest, and importance; namely, 'whether the owner of land through which water flows in a *subterraneous* course, has such an interest in the water as will enable him to sue a landholder who, in carrying on mining operations on his own land, in a usual and proper manner, yet drains away the water from the land of the former landowner, and lays his well dry?'—The question was decided in the negative, after great consideration, and upon arguments principally founded upon the rules of the Civil Law. The Chief Justice of the Common Pleas

* Instit. b. i. tit. 1, § 12

(Sir N. C. Tindal) thus stated the conclusion of the Court :—

“The Roman Law forms no rule binding in itself on the subjects of these realms ; but, in deciding a case UPON PRINCIPLE, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law,—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point, in favour of the defendants : of some others, the opinion is expressed with more obscurity. In the Digest, Lib. 39, Tit. 3. § 12, ‘Denique Marcellus scribit—cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo actionem: et sanè non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.’ ”

It is thus that the Common Law of England is enriched by spoils from every system of jurisprudence developed, in the course of ages, by intellect and experience. It has laid them all tributary ; it derives light and guidance from every quarter from which they can be safely obtained ; and is at this moment flourishing in a vigour which enables it to cast off most of the blemishes and imperfections which have been attached to it during the course of ages. It is a system proceeding on sure experience,—namely, on actual occurrences which have called its energies into exercise. It is familiar with occasions of litigation ; and can, by its inherent energy, adapt itself, as we shall presently see, to change and novelty : to the increase and improvements of property—to new

species of property—to new fraudulent devices—to novel discoveries of public policy. From this system has sprung a code of law stamped with an indelible impress of the character, habits, and opinions of an eminently free, commercial, and wealthy people, rich in land, and in the product and credit of commerce, and distinguished by a glorious love of liberty, by virtue and by piety; a code justifying the enthusiastic eulogiums which have been passed upon it by its greatest professors.* In respect of the PRINCIPLES which pervade it, the Common Law has been said by Sir Edward Coke to be reason itself, and the perfection of reason.† “Reason,” he observes, “is the life of the Law; nay, the Common Law is nothing else but reason; which is to be understood of an *artificial perfection* of reason, gotten by long study, observation, and experience, and not of every man’s natural reason; for *nemo nascitur artifex*. This legal reason *est summa ratio*. And therefore if all the reason that is dispersed into so many different heads were united into one, yet could he not make such a law as the law of England is; because, by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified of it—*neminem oportet esse sapientiores legibus*: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.”‡ To the same effect speaks also, in a tone of mingled moderation and dignity, Sir Matthew Hale.§ “The Common

* See Ram’s Science of Legal Judgment, p. 8.

† Burton’s Elem. Comp. § 7; Co. Litt. 976.

‡ Co. Litt. 976; 2 Co. Pref.; Calvin’s Case, 7 Co. 3 b; 4 a; 18 b; 19 a.

§ Pref. to Rolle’s Abridgment.

Law is not the product of the wisdom of some one man, or society of men, in any age ; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men. * * * When the subject of any law is single, the prudence of one age may go far, at one essay, to provide a fit law ; and yet even in the wisest provisions of that kind, experience shows us that new and unthought of emergencies often happen, which successively require new supplementary abatements or explanations. But the body of laws which concern the common justice applicable to a great kingdom, is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies ; and therefore requires much time, and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them : and such are the Common Laws of England—namely, the productions of much wisdom, time, and experience.” *

The Judges of Westminster Hall have been, and continue to be, the venerable architects † of the fabric of the Common Law ; but it must be owned that there is no little theoretical difficulty in characterising correctly the nature of their functions, while thus engaged. They are the depositaries of the laws, the living oracles, who must decide in all cases

* Cicero, in like manner, ascribed the excellent Institutes of the Roman Republic, to the gradual and successive improvements of time and experience : and he held that no one mind was equal to the task. *Nostra respublica non unius esse ingenio, sed multorum : nec una hominis vita, sed aliquot constituta sæculis et ætatibus—neque cuncta ingenia conlata in unum tantum posse uno tempore providere, ut omnia complecterentur, sine rerum usu, et vetustate.*—*DE REPUBLICA*, Lib. ii. 1. *Nec temporis unius, nec hominis, esse constitutionem reipublicæ.*—*IB.* ii. 21.

† Burton's El. Comp. § 7.

of doubt, and are bound by an oath to *decide according to the law of the land*.* “Of that law it is a wise maxim,” observes Sir F. Dwaris,† “consonant to the spirit of our constitution, and to be traced constantly pervading the whole body of our jurisprudence—*optima est lex quæ minimum relinquit arbitrio judicis, optimus judex, qui minimum sibi*.”‡ But another maxim of that law is, *Boni judicis est ampliare iurisdictionem*,§ which the late Lord Abinger, in *Russel v. Smyth*, 9 Mee. & Welsb. 818, thus rendered, or rather paraphrased:—“The maxim of the English law is, to *amplify its remedies*, and, without usurping jurisdiction, apply its rules to the advancement of substantial justice:” and he declared himself ready to set an example of permitting an action to be brought for a subject-matter—viz. costs on a foreign judgment,—assumed to have been never till then known, or allowed, in this country.—On what ground, then, it may be asked, do the determinations of our judges rest, when they overrule a former decision, and establish a rule contrary to that which had so been previously laid down?—When one of the three superior co-ordinate Courts solemnly decides that a *payment* shall be admissible evidence in reduction of damages; and another with equal solemnity afterwards overrules that decision, and decides that it shall not ||;—what more could the *legislature* have done, in this case, than is done by this second Court?—Again, what are really the boundaries between legislation and judicial interpretation? Undoubtedly they are exceedingly difficult to define. The author above quoted (Sir F. Dwaris) seems to admit that

* 1 Bla. Comm. 68, 9.

† 2 Statutes, 782.

‡ Aphorism 46, Lord Bacon's Works, vol. vii. p. 148.

§ Chanc. Prec. 329.

|| This is now settled by R. G. Trin. T., 1838.

the Judges have been in the habit of exercising an authority closely *resembling*, at all events, that of the legislature; and refers the origin of such authority to the supineness of the legislature. "When rules of law have been found to work injustice, they have been *evaded*, instead of being repealed. Obsolete or unsuitable laws, instead of being removed from the statute-book, have been made to bend to modern usages and feelings. Instead of the legislature framing new provisions, as occasion has required, it has been left to able Judges to invade its province, and arrogate to themselves the lofty privilege of correcting abuses, and introducing improvements. The rules are thus left in the breasts of the Judges, instead of being put upon a right footing by legislative enactment. Much of the evil is, no doubt, attributable thus to the supineness of the legislature, something to the narrowness of the rules of the Common Law: but the principal share, to the want of a proper understanding at what point *interpretation* ought to end, and *legislation* should begin." These observations are equally applicable to the judicial interpretation of statutes, and the judicial departure from precedent, in administering the unwritten law. In ancient times, cases of the *first impression* i. e. new cases, and all difficult matters, were usually adjourned into parliament, to be resolved and decided there, † says Sir Edward Coke, 'to which end parliaments were often holden—and there be infinite precedents in the rolls of parliament, of difficulties thus resolved.' Nor is this species of uncertainty confined to our own system of jurisprudence. "Even among our enlightened neighbours," says Sir F. Dwarrris, speaking

* Dwarrr. on stat. p. 792; Butler's Reminis. vol. i.

† 2 Inst. 418.

of the French, "and at a very recent period, the boundaries of legislation and of judicial interpretation were so vaguely defined, and so imperfectly understood, that the judges were constantly either mistaking the principles, or erring in the application of them;" and he justifies his assertion by copious citations from the *Discours Préliminaire du premier projet de Code Civil*, and to which we must refer the reader; as also to the whole of the 14th chapter of Sir Francis Dwarries's work; to the remarks of Mr. Amos, in his edition of Fortescue's *De Laudibus*, pp. 198—200; and some observations to be found in the Introduction to Mr. Smith's "Mercantile Law." Let us now, however, proceed to look at this matter a little more in detail, in order to illustrate the real difficulties of the subject; at all events in a speculative point of view.

It is a fundamental maxim of the constitution, that the judges are to *declare*, not to *make* the law:—*jus dicere*, et non *jus dare*. A Court, says Mr. Ram, in the interesting and useful work from which we have already quoted, when it constructs a judgment, forms it of certain *materials* * which are law. These materials the Court does not make; and so far the judgment is not *creative* of law; but *the judgment or body* into which the materials are wrought, is LAW—and that, though the materials may be ill chosen, or improperly applied. It would therefore seem that in some degree a judgment is creative of law; for, as long as it stands unreversed, the case is law, and may become so fast settled, in course of time, as to require an Act of Parliament in order to root it out of the law of the land. This has been called by

* Ram's Science of Legal Judgment, p. 2.

† For examples of such statutes, see stat. 11 Geo. IV. & 1 Will. IV. c.

Bentham and others "judge-made law ;" and it is indeed difficult to deny that the judges do, in such cases, exercise, and have from the earliest times exercised, in some degree, a species of legislative power. "It naturally becomes the subject of inquiry," observes Mr. Spence,* when speaking of the times in and before Edward I., "how the mere decisions of the *Curia Regis*, especially on such important matters as changing the course of descent, and altering the criminal law, acquired the force of laws, in a country where, in theory, the laws can have their force only from the consent of the King, Lords, and Commons in parliament assembled. Some persons have supposed that these changes must have been effected by Acts of Parliament, the records of which are lost. It is not, however, by any means necessary to resort to this supposition. With the study of the Roman law, the Roman principles of legislating became familiar with the Norman and English language. Consequently it became known that a very great proportion of the law which was then the object of study throughout Europe, was framed by the jurisconsults without any other public sanction than that of tacit consent. It seems therefore very naturally to have been considered, that that could hardly have been deemed an *usurpation* on the part of justices appointed by the sovereign, who are the fountain of justice, which had been sanctioned on the part of unaccredited jurisconsults, in a republic so jealous of any sort of arbitrary authority, as was that of Rome. Accordingly, as it would

40, on undisposed-of residues of the effects of testators ; and 11 Geo. IV. & 1 Will. IV. c. 46, relating to illusory appointments. *Vide quoque ante* p. 35 (n.) ; *post*, p. 433.

* *Laws of Modern Europe*, pp. 555 *et seq.*

appear, the justices of the two benches [King's Bench and Common Pleas] were permitted, by their solemn decisions, framed *pro re natâ*, and recorded in their respective courts, not only to declare the law where doubtful, or where no rule before prevailed, but also to *accommodate the law to the altered state of society*, until, by a succession of precedents, a system of law suited to the exigencies of society had been completely established. And although the principle of *stare decisis*, which is generally acted upon, has long prevented the Courts of Law from attempting any *fundamental* alteration in the recorded laws, the process of judicial legislation has not, by any means, ceased, in any of the Courts of Westminster Hall, as about 3818 pages of reports of their decisions annually testify."

Our judges, as we have seen, are sworn to decide *according* to the known customs and laws of the land—to conform, in other words, to established precedents—not to pronounce a new law, but to maintain, to enunciate, and expound the old one. But suppose an existing decision of one of the Courts, appears to another of them to be based upon insufficient grounds—to have proceeded upon erroneous reasons: even in such cases the judges, in overruling it, declare, not that the previous decision was '*bad law*,'* but that it was *not law at all*; i. e. was not, as had been erroneously determined, the established law of the land. There are many instances on record, of judges, and of the Court, refusing to overrule an existing decision, at the same time that they stigmatised it as 'a shocking

* This expression, however, is in practice often used by even the ablest judges. In *Balme v. Hutton*, 9 Bing. 476, for instance, Mr. Justice Patteson says—"The decision in *Letchmere v. Toplady*, 3 Mod. 326, is plainly bad law," i. e. of course, is *not law at all*.

decision.' (See per Mansfield, C. J., in *Morgan v. Surman*,* 1 Taunt. 292); "an extraordinary case," (per Eldon, C., in *Brummell v. M'Pherson*, 14 Ves. 175; per Mansfield, C. J., in *Doe v. Bliss*, 4 Taunt. 736);† "one that has produced considerable mischief," and "ought not to have been decided as it was" (per Eldon, C., in *Ex p. Hooper*, ‡ 19 Ves. 479, and see 1 Meriv. 9).—This list might be indefinitely extended. There are, on the other hand, a great number of instances in which judges have thrown aside all such misgiving and timidity, and boldly overruled even the most elaborate decisions of their predecessors. Thus we find even Lord Eldon declaring himself at liberty to overrule a case, "*though none can be entitled to more respect*," (*Aldrich v. Cooper*, 8 Ves. 390); or "*an authority to which the Courts look with great respect*," (*Walkwyn v. Lee*, 9 Ves. 34); or even "*a most solemn and deliberate opinion, after great consideration*, by Lord Hardwicke!" (*Ex p. Young*, 2 V. & B. 244). So Lord Ellenborough, C.J., in *Kightley v. Birch*, 2 Maule & S. 533, overruled the

* On this occasion, when counsel cited a case of *Chester v. Chester*, 3 P. Williams, 56, the Chief Justice interfered, and observed: "That case was decided on the authority of *Strode v. Lady Russell*, 2 Vernon, 621. It is a shocking decision, but it has been followed by a hundred others!"

† "Certainly the profession have always wondered at *Dumpor's case* (4 Coke, 119); but it has been law so many centuries [i. e. since A. D. 1603], that we cannot now reverse it." Per Mansfield, C. J., in *Doe v. Bliss*. "Though *Dumpor's case* always struck me as extraordinary," says Lord Eldon, C. (in *Brummell v. M'Pherson*), "it is the law of the land at this day," i. e. 1807; and it is so now (1845), and has even been carried further, by many subsequent decisions. See 1 Smith's Leading Cases, p. 18 (1st ed.).

‡ "With great deference to Lord Thurlow, his decision, that the deposit of a deed necessarily implied an agreement for a mortgage, has produced considerable mischief; and the case of *Russell v. Russell*, 1 Bro. C. C. 269, ought not to have been decided as it was. It has, however, been repeatedly followed, and must not now be disturbed." Per Eldon, C., in *Ex p. Hooper*, 19 Ves. 479.

case of *Bage v. Bromuel*, 3 Levinz, 99, somewhat cavalierly saying that "*it had had its day*, and it was time that it should cease!" A long list of such instances is given by Mr. Ram, in his *Science of Legal Judgment*, p. 123. It is also worth while to direct the student's attention to the late well-known case of *Balme v. Hutton*, 2 Tyrr. 17, which overruled many preceding cases, commencing with one of Lord Mansfield's in 1756, viz. *Cooper v. Chitty*, 1 Burr. 20. The marginal note of this last case, in the copy of Burrows' Reports in the possession of the author, is thus given by the late Lord Tenterden, in ms., in the margin of the case:—"If a Sheriff take goods in execution *after* an act of bankruptcy committed, but *before* commission issued; and after commission issued, and assignment by the commissioners, sell the goods, the assignees may recover their value against him in Trover." After full argument, the Court of Exchequer (Lord Lyndhurst being C. B.), in a most elaborate judgment, held, in the case above mentioned, that Trover would *not* lie in such a case; but that decision was afterwards itself overruled on a Writ of Error (*Balme v. Hutton*, 9 Bing. 471), which established the liability of the Sheriff, even though entirely ignorant of the act of bankruptcy—the Judges (p. 524, *et passim*) rejecting all appeals founded on the glaring hardship of the case, and properly declaring that "nothing short of the authority of Parliament itself was sufficient to relax the severity of the former law." Parliament did, a few years afterwards (1839), interfere for that purpose (2 & 3 Vic. c. 29). The foregoing contrarieties of opinion illustrate the conflict between theory and practice, which cannot but be looked for in so peculiar and composite a system of jurisprudence as ours—one formed of such *heterogeneous* materials—bearing in

mind, also, the varying views taken by differently constituted minds, of one and the same object, and the infirmity of human judgment. *Quot homines tot sententiæ*: and if there do exist a few such instances of discrepancy and contradiction as that above cited, what are they, when contrasted with the almost inconceivable number of unresisted decisions, upon every imaginable species of rights and wrongs, and ever-varying combinations of circumstances?* They are, also, highly illustrative of the striking observation of Sir James Mackintosh, already cited, “that the science of law is continually struggling to combine inflexible rules with transactions and relations perpetually varying.”

“It has been the constant labour of the judges,” observes Mr. Burton,† “through all the changes of society, to keep the common law consistent with *reason*, and with *itself*. These two objects have not always been found compatible; and sometimes one has been sacrificed, and sometimes the other. Yet no candid learner can fail to appreciate either the wisdom of the old maxims, or ‘the variety, almost infinite, of authorities, ancient, constant, and modern; and, withal, their amiable and admirable consent in so many successions of ages.’”‡ The same able writer afterwards states his fears, that he may have seemed, in the foregoing paragraphs, to attribute too much of *legislative* authority to the judges, ‘which, however in fact exercised by them in former times, has never been formally asserted;’ and he proceeds to give, in two or three sentences, which

* Harrison’s Digest, which commences no earlier than with the time of Lord Mansfield, [1756,] and comes down to the year 1843, contains no fewer than *forty-four thousand* REPORTED decisions—of which only a few belong to the Equity Courts! See 1 Law Rev. p. 37.

† Elem. Comp. § 7.

‡ Co. Litt. 395 (a).

we shall here present to the reader, an ingenious, and upon the whole, a satisfactory account of our common-law system. "The true idea of the common law, seems to be that of an organised system, having its principle of growth within itself, and of which the judges are themselves a part. No *new law* can ever proceed from them; *but the old is, by their means, in a continual process of further development.* Their business, in the most doubtful and unforeseen cases, is still to consider **THE LAW**, as *already fixed*, to discover, and to assert it."* Our judges, bearing in mind the true character of the Common Law, especially as contradistinguished from Equity, and their own duty as the sworn depositaries and depositors of that common law, may, in this point of view, be regarded as *continually developing its innate energies and capabilities to deal with new combinations of circumstances*: and in so doing, no more departing from the office assigned to them, than would a geometrician be held to be violating his allegiance to Euclid, by applying his established principles to cases to which, though never contemplated by him, they applied, and which they absolutely governed.

The following passage in the judgment of Mr. Baron Parke, in *Mirehouse v. Renwell*, 8 Bing. 515 (on Error, in the House of Lords), affords a very satisfactory exposition of the principles upon which the judges ought to proceed, and do proceed, in thus applying the doctrines of the Common Law to new combinations of circumstances. "The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them, of any of our judges, or of those ancient text writers to whom we look up as

* Elem. Comp. p. 3, note (7 n.), 1st ed.

authorities. The case, therefore, is in some sense new, as are many others which continually occur: but we have no right to consider it, because it is new, as one for which the law has not provided at all; and, because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our Common Law system consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents: and for the sake of attaining uniformity, consistency, and certainty, we must apply these rules, when they are not *plainly* unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and abandon all analogy to them, in those to which they have not hitherto been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." In uttering these words, this very eminent judge may be regarded as the exponent of the true judicial feeling and determination in Westminster Hall. Thus also spoke another very learned judge (Mr. Justice Ashurst),* in answer to an argument founded on the *novelty* of a particular action: "The argument which has been made use of is, that this is a *new case*; and that there is no precedent of such an action. Where cases are new *in their principle*, then I admit that it is necessary to have recourse to legislative interposition, in order to remedy the grievance. But when the case is new only *in*

* *Pasley v. Freeman*, 3 T. R. 63.

the instance, and the sole question is upon the application of a principle recognised in the law, to such new case, it will be just as competent to courts of justice, to apply the principle to any case, which may arise two centuries hence, as it was two centuries ago. If it were not, we ought to blot out of our law books one fourth part of the cases which are to be found in them."

There is a section in Paley's Moral and Political Philosophy (Book VI. chap. viii., 'of the Administration of Justice'), which contains a very masterly statement of the causes of those doubts and controversies which must ever arise concerning the application of the principles of justice to the affairs of mankind, under even the most perfect systems of jurisprudence. Its perusal will be so profitable to the student, in connection with this part of the subject, that we have determined on presenting him with the passage, entire, in the Appendix (No. V.) The last of the eight 'Reasons' there given, has been cited, with another view, in an earlier portion of this work (*ante*, p. 206-7).

We have seen in the foregoing pages instances of judges deliberately adhering to decisions which they at the same time admitted to be both erroneous, and mischievous. We have seen other instances of judges doing directly the reverse, and overruling decisions which seemed so firmly incorporated in our law as to require an act of Parliament to extirpate them. The *tendency* of the courts, in modern times, appears, upon the whole, to be in favour of the latter course.

Whatever may be the difficulty of defining the extent to which former decisions should be adhered to, one thing, at all events, seems clear: *that uniformity is of more importance than Equity, in proportion as a general uncertainty*

would be a greater evil than particular injustice. It has been well observed by Sir Francis Palgrave,*—that “the principle of adopting *precedent* as the guide of judicial decisions, gives stability and vigour to the administration of justice. Speculative wisdom never can devise a code capable of providing for the infinite variety of cases arising out of the transactions of even the most simple state of society. A system of jurisprudence founded on precedents, admits the engrafting of other precedents as they arise: and this will form the nearest approach to a perfect code; because, although no two cases are ever *exactly* similar, still no one new case ever happens which has not had a fore-runner, in some earlier case, so nearly analogous to it, as to afford a rational rule to the tribunal.” The rule laid down by Blackstone is, that “precedents should be followed,” unless *flatly absurd and unjust*;† which contains, perhaps, as safe a limitation as can be well devised. Still, however, it leaves the matter open for the exercise of *discretion*, on the part of judges, in inquiring into, and determining the degree of error imputable to a previous decision. Can it, however, practically be otherwise? Is the Legislature, in defiance of the ancient rule of *dignus vindice nodus*, to be called into exercise, in order to correct every faulty decision? If not, some one must do so; and who so fit as the judges—who else, in fact, is

* Original Authority of the King's Council, pp. 9, 10.

† Vol. i. p. 70. “Not that the particular reason of every rule in the law,” says Blackstone, “can, at this distance of time, be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason: and then the law will presume it to be well-founded.” Such was also the doctrine of the Civil Law: “Non omnium quæ à majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationis eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.” Ff. 1. 3. 21.

there to undertake the duty—of preventing injustice by adhering to faulty decisions, on the one hand, and, upon the other, avoiding the incalculable evils of uncertainty in the law? The judges of the present day, if bolder than some of their predecessors, have nevertheless repeatedly recognised the necessity of adhering to former decisions, except in very clear cases of error. “In our system of judicature,” says Mr. Baron Parke, in *Garland v. Carlisle*, 2 Crompt. and Mee. 64, “we are bound by precedent, and the authority of previous cases, *unless they are plainly and manifestly* founded upon erroneous principles; and that for the wise purpose of securing a reasonable degree of certainty in our judicial proceedings.” “The decisions of our predecessors,” said the late Lord Tenterden, in an important case, (*Selby v. Bardons*, 3 Barn. & Adol. 17,) “the judges of former times, ought to be followed and adopted, *unless we can see very clearly* that they are erroneous; for otherwise there will be no certainty in the law.” And again, the same eminent judge thus expressed himself in another case (*Williams v. Germaine*, 7 Barn. & Cress. 476):—“It is of great importance, in almost every case, that a rule once laid down, and firmly established, and continued to be acted upon for many years, should not be changed, *unless it appears clearly* to have been founded upon wrong principles.” * Thus also said another able judge: (Mr. Justice Ashurst, in *Goodtitle v. Otway*, 7 T. R. 419.) “One would always wish that the law were *certain* upon all

* Chief Justice Tindal, in the case of *Mirehouse v. Rennell* (above adverted to), thus expresses his characteristically cautious opinion: “I think it a safer course upon this occasion, as I find has been the opinion of other judges from the earliest periods of the law, to adhere to *any rule* which can be safely inferred from the cases, rather than to substitute another, although it may appear, upon general principles, more reasonable and more just.”

subjects—and perhaps it is of less importance *how* the law is determined, than that it *should* be determined and certain.” Thus also Lord Chancellor Parker (in *Butler v. Duncomb*, 1 P. W. 452,) “When things are settled and rendered certain, it will not be so material *how*, as long as they *are* so, and that all people know how to act.” So Lord Chancellor Hardwicke: “Certainty is the mother of repose; and therefore the law aims at certainty.” *

These observations apply with irresistible force to the rules of *real property*. Uncertainty *there* may affect every man, and to such a degree that, as Mr. Justice Ashurst observed in *Goodtitle v. Otway*, “the ablest conveyancers may not be able to direct him.” Who can tell how many thousands of estates stand, or depend, upon the rule which it is sought to impugn and abrogate? “*Stare decisis*,” said Chief Justice Wilmot, “is a first principle in the administration of justice—because these cases have furnished the light by which conveyancers have long been directed in settling and transferring property from one man to another. Upon the faith of an established rule, and the acquiescence of judges, and of the whole nation in it, property to the amount of millions may depend. The judges now, as their predecessors have always done, bow down to the rule *pro salute populi*, which is the supreme law of every community.” †

Lord Mansfield and Lord Kenyon may be cited as representatives of the two extremes of opinion, as to the duty of judges adhering rigidly to established rules of law, or moulding them to meet the altering exigencies of the times. Thus spoke Lord Mansfield,—

* 1 Dickins' Rep. 245.

† Wilmot's Notes of Opinions, &c., p. 312.

“*Quicquid agant homines* is the business of courts : and as the usages of society alter, the law must adapt itself to the various situations of mankind.”* Again,

“This is the general rule. But then it has been said, that, as the times alter, new customs and new manners arise: these occasion exceptions; and justice and convenience require different applications of these exceptions, within the principle of the general rule.”†

Thus, however, spoke Lord Kenyon, the successor of Lord Mansfield, with reference to the above expressions of opinion :—

“I confess I do not think that the Courts ought to change the law, so as to adapt it to the fashion of the times; if any alteration in the law be necessary, recourse must be had to the legislature for it.”‡ Again,

“We must not, by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it.”§ Again,

“It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate; but by my industry I can discover what my predecessors have done, and I will servilely [!] tread in their steps.”||

Innumerable traces will be found by the attentive student, in perusing the decisions of our courts, of the conflict between these opposite principles. It cannot be denied, however, that the doctrine of Lord Mansfield appears to be, upon the whole, more convenient and satisfactory

* *Barwell v. Brooks*, 3 Douglas (Frere & Rose. Ed.), 373.

† *Corbett v. Poelnitz*, 1 T. R. 8.

‡ *Ellah v. Leigh*, 5 T. R. 682.

§ *Clayton v. Adams*, 6 T. R. 605.

|| *Bauerman v. Radenius*, 7 T. R. 668.

than that of Lord Kenyon ; but it behoves our judges to act upon it with much of that spirit of caution which led Lord Kenyon—if we may presume to say it—into an opposite extreme. That sturdy common lawyer, in enunciating the doctrines above referred to, took his stand upon the solid ground of constitutional principle—one of the most important, indeed, that ever has been assigned as a bulwark of our liberties—namely, a *jealousy of judicial discretion*. “The *discretion* of a judge,” said Lord Camden, “is the law of tyrants.” This is the true cause of our adherence to fixed rules, and of many consequent defects in our law. “We have just reason,” observed Mr. Hallam,* “to boast of the leading causes of those defects . . . an adherence to fixed rules, and a jealousy of judicial discretion, which have in no country, I believe, been carried to such a length. Hence,” proceeds that acute and severe critic of our legal system, “precedents of adjudged cases, becoming authorities for the future, have been constantly noted, and form, indeed, almost the sole ground of argument in questions of mere law. But these authorities being frequently unreasonable and inconsistent, partly from the infirmity of all human reason, and partly from the imperfect manner in which a number of unauthorised and incorrect reporters †

* Middle Ages, vol. ii. p. 469.

† The late experienced and learned Mr. Chitty thus expressed himself upon the subject of the existing multiplicity and frequent imperfection of *legal Reports* :—

“With respect to legal Reports, it has been the misfortune of the profession, in *some* instances, to have them undertaken by inexperienced persons, who can scarcely understand the question before the Court, and still less appreciate the import of the arguments or judgment ; and whose haste and misapprehension too often occasion the mis-statement even of facts. A person should

have handed them down, later judges grew anxious to elude, by impalpable distinctions, what they did not venture to overturn." The present administration of the law is generally characterised by a prudence and moderation which have commanded the respect and confidence of the community. There have been one or two instances, undoubtedly, of recent important decisions which do not appear to be reconcilable with the established principles of the Common Law, nor to have been the fruit of that enlightened deliberation which should always characterise judicial decisions. Such cases are, however, rare.—Before quitting this branch of the subject we would refer the student for an illustration of what we have ventured to term the *quasi* legislative action of our judges, in modern times, to the Law of Fixtures, as exemplified in the preceding chapter, pp. 301-2.—Notwithstanding their exercise of such power, they constantly declare their adherence to the rule — *judicis est jus dicere, non jus dare* ; and properly unmoved by any appeals on the score of hardship

be a good lawyer, to be a reporter. It is scarcely fair to a Judge, and is likely to mislead the profession, to report *nisi prius* cases, or even the decisions of a single Judge in the Practice Court ; but, really, three or even five reports of the same case, as at present [*i. e.* 1835—what would he say *now* ?] to be found, are too severe a tax on the time, and pocket, of the profession ; more especially when they, as usual, reiterate similar decisions upon the same point, instead of confining reports to new and important points decided *in banc* ; and not unfrequently copy from a prior report. I remember the late Lord Ellenborough's declaration, "Although I cannot refuse to hear such decisions and hasty *dicta*, when quoted by counsel, yet I wish that in every town and village in the kingdom there were an officer of justice to perform on such books the same office as was so ably executed by the curate and the barber upon Don Quixote's library." 1 Chitty's Gen. Pr. p. (7, note c). From this severe and sweeping, yet by no means entirely unjustifiable censure, ought to be excepted some of the *Nisi Prius* Reports of the present day : while those of Lord Campbell have long been proverbial for their accuracy and value.

inflicted in particular cases, by adherence to a clear rule of law, generally leave the matter to be rectified by the legislature. Such arguments have been long ago discarded from Westminster Hall, where the maxim of the late Lord Tenterden prevails:—" *Hard cases make bad law.*" Many instances might be cited of this inflexibility on the part of our Courts of Law. An interesting and remarkable one will be found mentioned by Lord Ellenborough, C. J., in *Doe v. Barford*, 4 Maule & Sel. p. 12. "It is part of the infirmity of human legislatures," observed Mr. Baron Gurney, in *Garland v. Carlisle*, 2 Crompt. & Mee. 53, "that the general rule which they prescribe, will work hardship in particular cases; and it is for the legislature to afford such relaxation of the rule, as can be done with safety." Instances of the legislature's interference to cut the Gordian knot of difficulty could be easily multiplied. One was mentioned in the introductory chapter, (*ante*, p. 35 (n),) and another at page 422; while a third is afforded by stat. 7 & 8 Vict. c. 112, s. 17 (1844); which, on grounds of a wise and humane policy, has abrogated that long-established rule of law, that 'freight is the mother of wages'—[i. e. if, during a voyage a total loss, or capture should occur, the seamen lose their wages.]* They must henceforth, however, be paid their wages in such a case, up to the period of the wreck or loss, whether freight may or may not have been earned by the ship; provided they have exerted themselves to the utmost to save the ship, cargo, and stores.

It may be stated, but with the utmost humility, that while experience, caution, and wisdom, are the undoubted characteristics of the Common Law, and its administrators,

* See Abbot on Shipping, p. 457 (5th ed.).

the Legislature has, especially of late years, too frequently disentitled itself to such encomiums ; particularly in many of its interferences with the Common Law of the land, which have been distinguished by rash short-sightedness and error, abundantly justifying the significant observation of Blackstone: " it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath, in the end, appeared from the inconveniences which have followed the innovation." * Would it be difficult to fill several pages with illustrations of the truth of this observation? Can there be a more humiliating instance of such legislative imbecility, than the act professedly for "Simplifying the Transfer of Property," passed during the last session (1844)—stat. 7 & 8 Vict. c. 76—which almost instantly, on its appearance, notwithstanding its containing one or two undoubtedly excellent provisions, was condemned on all hands as pregnant with incalculable mischief, and is to be either repealed *in toto*, or essentially re-modelled, during the present session (1845)? It is almost impossible to take up a number of the Law Reports which does not disclose evidence of the loose, unintelligible, inconsistent, and contradictory nature of—we fear it may be said—most of our modern statutes; defying the utmost efforts of the most acute and practised legal intellects, and the boldest stretch of judicial construction, to construe them; and requiring, even after all this, the repeated, but often ineffectual, interference of the Legislature to correct its own errors. Did our limits admit of our doing so,

* 1 Bla. Comm. 70.

we could cite a very great number of cases which have happened within the last five years, verifying the foregoing statements to the very letter. To return, however, to the Common Law.

By whatever name the functions of the Judges, in deciding cases of law, may be described; whether they strictly adhere to, or depart from, the letter of the rule, that they are 'not to make, but only to *declare*' the law—whether, in Lord Coke's language, they judge "according to the *Golden Metwand* of the law, and not by the crooked cord of *discretion*,"—enough has been said to show the student that the principles which govern them, on every occasion of applying, amidst "the competition of opposite analogies," existing rules to those new facts and relations with which every day and hour is teeming, require the possession, equally in judges and counsel, of sound logic, and accurate legal knowledge. Either of these is comparatively unavailing without the other.—A few days' attendance in Court, when the student is qualified to appreciate what is passing, will show him the display, by both the Bench and the superior members of the Bar, of truly admirable skill and readiness in suggesting analogies and distinctions, often most refined and delicate, *but still perfectly decisive*. In accordance with the principles which have been above explained, he will see with what sort of weapons a practised lawyer may successfully attack the authority most relied upon by his opponent. *Exempli gratia*—It is 'ill reported:' it is 'a mere Nisi Prius decision:' an '*obiter dictum*:' was 'not much' or 'was ill argued,' or 'not argued at all:' the Court was equally divided, or not unanimous: the decision has been disapproved of by Judges: the reasons of the judgment

are not given: no account is given of the pleadings: there *must* have been other facts not apparent in the report: a certain previous case was not cited in argument: it is inconsistent with previous or later decisions: was made in forgetfulness of a particular statute: has never been challenged, nor acted upon; it was not a deliberate and final judgment. If all these fail, then the case may be impugned as contrary to principle, and deserving to be overruled; or, lastly, it is distinguishable from the case to which it is sought to be applied.

The experienced advocate may, on the other hand, defend an assailed authority, and enhance its value, by several arguments. It is the *dictum* or the decision of an eminent, a cautious, an accurate, or a very learned, or an acute Judge: of great industry and research: peculiarly skilled in the particular branch of law to which the case relates: as, in conveyancing law; equity; pleading; revenue law; evidence; mercantile law; sessions' law; crown law; criminal law; ecclesiastical law: liberal in his views of law: prone to administer law in the spirit of equity; or strict in adhering to the rules of law. It is the judgment of the full Court: of "most learned" Judges: of a "strong" Court:* an unanimous Court: after time taken for deliberation: great pains taken: twice argued: argued by eminent and acute pains-taking counsel: not likely to overlook a point: acquiesced in by the parties: never appealed against: or appealed against and confirmed: has been constantly cited during a series of years: one peculiarly likely to have challenged observa-

* "Thereupon the strong court which then sate in the King's Bench—Willes, Ashurst, Buller, Lord Mansfield—thought the plea a good one." Per Gibbs, C. J., in *Prince v. Nicholson*, 5 Taunt. 671.

tions, if objectionable: has never been disapproved of: reported by a gentleman of well-known learning and accuracy: is consistent with the principles of many later cases: and governs that to which it is applied.

These are the topics* which the author has heard in daily use in the Courts for many years, and on innumerable occasions, often urged with signal skill and success: and such is the scrutiny, such are the tests, to which nine-tenths of our decided cases have been subjected, before being allowed to remain as integral portions of the established and accepted "Common Law." It would seem to have been, from time immemorial, for the most part "judge-made" law; if by that term may be properly designated the application of pre-established principles to the new combinations of facts continually calling for specific adjudication, and receiving it, by the light of analogy and comparison; the Judges, in doing so, adhering to former decisions, or overruling them, if deemed erroneous. We have observed in the last chapter, the benignant influence exerted upon the Common Law by the genius of Equity—the extent to which the Judges of the former, have, in modern times, guided themselves by the principles of the latter, in mitigating and moulding the more rigid and apparently inflexible rules of the ancient Common Law:† we have also seen the Legislature from time to time interfering, with the same view;‡ and the Judges, again, to a certain extent, occa-

* See most of them *in extenso*, and illustrated by a great number of cases, in Ram's Science of Legal Judgment, Chap. XV. and XVIII. All the topics mentioned in the text are founded upon *judicial* authority, and may therefore be relied upon by the student, and ought to be the subject of frequent meditation.

† *Ante*, pp. 300, *et seq.*

‡ The following is Mr. Serjeant Stephen's account of the origin of Equity: "The ancient structure of our national jurisprudence was singu-

sionally approximating towards the exercise of even a species of legislative authority; the object in each case being the same, namely, to adapt the ancient, rigid, limited, and complicated provisions of the Common Law, to the novel, multifarious, and pressing exigencies of modern times. Thus, in short, has it come to pass, that, in the language of the late Lord Wynford, in the House of Lords, in the celebrated case of *Fletcher v. Lord Sondes*,* “*The judgments of the Courts of Westminster Hall, are the only authority that we have for by far the greatest part of the law of England.*”

larly defective in compass and enlargement of view. It took no account of several defects for which it is the duty of civilised judicatures to provide; and to others applied maxims too strict and unbending to satisfy the notions of justice in an advanced stage of society. Its judicial remedies were also, in some cases, of a cumbrous and inconvenient character. For these evils, the progressive introduction of new remedial laws, by act of the legislature, would seem to have been the natural remedy. But the course of things was different. Owing, perhaps, to some peculiar averseness, in the early genius of the country, from change in its legal institutions, the law administered between subject and subject, in the ancient courts of the realm, was allowed to remain for a long period of our history with very little alteration of a fundamental kind. But new courts were, on the other hand, gradually established, with a collateral—and in some sense an usurped—jurisdiction, in which cognisance was taken of those subjects which the proper law of England had overlooked, or insufficiently regulated; relief given from the consequences of some of its harsher doctrines, and the defects of its judicial methods, in certain cases, supplied. These courts having been, at the outset, resorted to chiefly for one of the particular purposes above-mentioned—viz. of mitigating the severity of the common law, as applied to particular cases—the whole system of rules and principles thus administered, obtained (without much propriety, but in reference to the literal principle of interpretation applied by jurists to the interpretation of positive laws) the appellation of *EQUITV*, and soon began to hold that divided empire with the more ancient or common law which it still retains.” (1 Comm. 78.) This author treats Equity as a “species of unwritten law, which has long formed part of the general system;” while Mr. Burton (Elem. Comp. of Real Prop. § 9) regards the system of Equity “as a kind of secondary common law.” *Vide ante*, p. 396.

* 3 Bing. 588.

In contemplating this venerable, this incomparable product of wisdom, experience, and integrity, the following eloquent passage from the writings of Sir James Mackintosh is fitly expressive of the sentiments likely to occur to the philosophic observer of our legal system. "There is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence: where we may contemplate the cautious and unwearied exertions of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion, and subjecting it to inflexible rules: extending the dominion of justice and reason, and gradually contracting, within the narrowest possible limits, the domain of brutal force and arbitrary will."*

In conformity with the system of feudal countries, our early Norman princes had one standing COUNCIL to assist them in the collection and management of their revenue, the administration of justice to suitors, and the despatch of all public business.† This standing council constituted a COURT—'Curia Regis'—or (from the place in which it ordinarily sat) 'Aula Regis,' the KING'S COURT, and was held in the King's palace, or wherever he was personally present. Of this Court the Sovereign himself was Judge, assisted by the Grand Justiciary [whose too formidable office was abolished altogether by Edward I.] and other great officers of state. The King used often, in those times, to make the tour of his dominions, in order to give all his subjects the opportunity of applying to his Court, for justice. Its labours were lightened by numerous *local* Courts;

* Discourse on the Study of the Law of Nature and of Nations, p. 58.

† 2 Hall. Middle Ages, p. 461.

but so much more confidence was reposed by suitors, in the wisdom and integrity of the supreme tribunal, which was seldom animated by those local prejudices, or actuated by those local interests which were too apt to sway the local Courts—that the *Curia Regis* soon became grievously overburdened with business.* Partly on account of the intolerable expense and delay which the universal resort to this Court entailed upon suitors, and partly, perhaps, on account of the attachment which our ancestors felt to their ancient right of trial by the neighbouring freeholders, Henry II. established ITINERANT JUSTICES [justices in *Eyre*, i. e. *in itinere*] to decide civil and criminal pleas within each county. Mr. Hallam makes here an observation, so just and striking, that we shall present it to our readers. “To this excellent institution we have owed *“the uniformity of our common law*, which would otherwise have been split, like that of France, into a multitude of local customs; and we still owe to it the assurance, which is felt by the poorest and most remote inhabitant of England, that his right is weighed by the same incorrupt and acute understanding, upon which the decision of the highest questions is reposed.”†

The Justices in eyre, above spoken of, were some time afterwards superseded by the Justices OF ASSIZE, who continue at this day to proceed, as they have done for ages, twice a-year, into all the counties in England, and,—since 1830, Wales,—in the spring and summer circuits. This institution had other excellent effects: viz., in the language of Mr. Hallam, its powerful tendency to knit together the different parts of England; to check the influence of

* Smith's Elem. View of an Action at Law, pp. 2, 3.

† 2 Hall. Middle Ages, p. 463; and see 1 Hall. Const. Hist. p. 9.

feudality and clanship ; to make the inhabitants of different counties better acquainted with the capital city, and more accustomed to the course of government ; and to impair the spirit of provincial patriotism and animosity.* To this subject, however, we must again return.

In one leading branch of the KING'S COURT were exclusively transacted all matters relating to the revenue ; and this department was distinguished from the other parts of the King's Court, by the name of THE EXCHEQUER. Long after the separation of the Exchequer from the King's Court,—probably as early as the reign of Richard I.†—another branch was detached for the decision of civil suits.‡ This was the Court of COMMON PLEAS ; which, by the fourteenth clause of Magna Charta, it was ordered, “should not follow the King's Court, but be held in *some certain place*.” This led to the establishment of the Common Pleas at Westminster, in the reign of King John : and this alteration in the former system may be regarded as the origin of our present system of judicature. As soon as this last Court had been thus settled at Westminster, there was such a great resort to it, that, about the beginning of the reign of Edward II., he was obliged to increase the number of Judges from three to *six* ; and so to divide them that they might sit in two places.§ The words “*Common Pleas*” were used in contradistinction to

* 1 Constitutional History, p. 9 (2d ed.).

† Madd. Exche. c. 19 ; 2 Hall. Middle Ages, p. 464.

‡ The principal officers of state, who had originally been effective members of *The King's Court*, began to withdraw from it, after this separation into three distinct courts of justice, and left their places to regular lawyers. The Chancellor and Treasurer of the Exchequer, however, have still seats in that Court : a vestige of its ancient constitution, of which a glimpse is still afforded annually.—See 2 Hall. Middle Ages, p. 465.

§ Fortescue, *De Laudibus*, c. li., and Mr. Selden's note (a).

"*Crown Pleas*:" and thus was formed the Court of Common Pleas at Westminster, with full, and, strictly speaking, exclusive jurisdiction over *all civil* disputes, when neither the King's interest, nor any matter savouring of a criminal nature, was concerned: for of such *i. e. civil* disputes, neither the Court of King's Bench, nor that of the Exchequer, were ever able to take cognizance, except by means of a legal fiction, which in the one case supposes an act of force—*i. e.* a "trespass," in the other, a "*debt* due to the Crown." These two expedients have been already sufficiently explained.*—While, however, the establishment of the Common Pleas at Westminster removed one grievance, it created another: for though suitors were no longer forced to travel about the country after the King's Court, yet they were obliged to come up in all cases, from all parts of England, to Westminster. With a view to remedying this serious inconvenience, in the thirteenth year of Edward I., suitors were permitted to prosecute and defend their suits by ATTORNEY. Hence originated the employment of attorneys of the Courts at Westminster.† After this local establishment of the Court of Common Pleas, the King's Court (*Curia Regis*) continued to attend the King's person, and decide causes in which his rights were concerned; but all the great lawyers established themselves near Westminster, in the Inns of Court, devoting themselves to the more lucrative business transacted in the Common Pleas.‡ In the reign of Edward I. our entire system of judicature was, after great consideration, entirely remodelled. The *Common Pleas* he left, as he had found it, in entire possession of the civil

* *Ante*, p. 285 n.

† Smith's *Elemen. View*, p. 4.

‡ *Id. ib.*

business of the kingdom; and the Exchequer intrusted with the exclusive management of revenue matters: while the King's Court—in process of time called the King's Bench—the *remnant of the ancient Aula Regia*—continued to possess, *as it still does*, the criminal jurisdiction of that ancient Court, and also a superintending power and authority over all the inferior tribunals of the country: commanding them, by the high prerogative Writ of MANDAMUS, * to perform what the law requires: by Writ of PROHIBITION, † to abstain from what it prohibits; removing their proceedings into itself by CERTIORARI: and reversing them when erroneous by Writ of ERROR, or FALSE JUDGMENT. In this Court—the King's Court—frequently sate the King himself. King Edward I. often presided in it personally; and it was distinguished by the presence of a monarch—James I.—even as late as the seventeenth century. As a remnant of the *Curia Regis*, the Sovereign may still order it to accompany his person: a command which Magna Charta, as we have seen, prohibits him from imposing upon the Common Pleas. For this reason it is, that while other original writs are made returnable ‡ “at Westminster,” those returnable in the Queen's Bench are expressed to be “BEFORE THE QUEEN HERSELF, WHERESOEVER SHE SHALL THEN BE IN ENGLAND.” § For many centuries, however, the Court of Queen's Bench has remained stationary at Westminster, equally with the Courts of Common Pleas, and Exchequer, except during the Plague and Civil Wars. By the quaint contrivances to which we have already

* *Ante*, p. 316.

† *Ante*, p. 317.

‡ *Post*, p. 451 *et seq.*

§ Edward I. once ordered this Court to follow him to Scotland: and it actually sate, accordingly, for some time, at Roxburgh.

several times alluded, the Courts of Queen's Bench and Exchequer have gradually encroached upon the province of the Court of Common Pleas, till they have both succeeded in obtaining a jurisdiction co-extensive with it, in all *personal* actions: and this usurped jurisdiction, stat. 2 & 3 Will. IV. c. 39 (the *Uniformity of Process Act*), recognises and confirms, at the same time abolishing the fictions by means of which it had been obtained. A suitor has now, therefore, the choice of any of the three Courts at Westminster—to be determined by his opinion of the character of the respective Judges, and of the superior convenience of their mode of procedure—in which to institute a personal action. We have seen (*ante*, p. 440), that in former times there were as many as six Judges in the Common Pleas; and we learn, from the same great authority, Fortescue, that the King's Bench had sometimes five, but generally four judges. For a very long period of time, however, each of the three superior Courts at Westminster has consisted of four Judges only—viz., a chief, and three puisne Judges: but, as we shall presently see, the increased business of the Courts led the Legislature, in 1830, by stat. 1 Will. IV. c. 70, s. 1, to add a puisne Judge to each of the Courts. There are now, therefore, fifteen Common Law Judges; all of whom hold their office for life—*i. e.* in legal understanding, *quamdiu se bene gesserint*; being removable only by the Address of both Houses of Parliament: a wise provision, to secure their complete independence.

The officers and members of these Courts are principally of four kinds. I. The **MASTERS**; of whom there are five attached to each Court. They may be selected from among either barristers or attorneys; and hold their

appointments for life. They are, for manifest reasons, prohibited from private practice; and discharge numerous and most important duties—principally that of taxing costs. II. BARRISTERS and SERJEANTS. These are the persons who alone have audience on behalf of clients in the Superior Courts. The latter only, *i. e.* serjeants, are at present, for reasons which will be presently explained, allowed to address the Court of Common Pleas *in term time*, or sign pleadings in actions depending there. III. ATTORNEYS also are, as need hardly be said, a most important class of officers belonging to the Superior Courts. IV. SHERIFFS also, as far as they are entrusted with the execution of process, are officers of the Superior Courts, and have important and often very critical and harassing duties to perform.*

A fundamental rule of the Common Law, and on which, as Mr. Hallam has correctly observed,† rests the whole theory of PLEADING (as will be hereafter explained), has always been ‘*de JURE judices, de FACTO juratores respondent.*’ All our authorities show that, questions of fact being the exclusive province of the jury, questions of law have been in like manner that of the Judges. Thus we find, as early as in the sixth year of Richard I., the following entry in the Placitorum Abrev. (5 Warr.), that “*sub judicibus* lis et contentio fuit, utrum carta prædicta debet teneri, versus puerum qui infra ætatem?” And in the fourth year of the reign of King John, we find the jury themselves declaring upon an inquisition, ‘non pertinet ad

* See the remarkable case of *Stockdale v. Hansard*, 9 Ad. & Ell. 1: in which the Sheriffs of London were imprisoned by the House of Commons for a contempt in doing that, for the *not* doing of which, the like fate would have awaited them at the hands of the Court of Queen’s Bench!

† 3 Const. Hist. p. 8.

*eos de jure discernere.** This cardinal distinction between the modes of adjudicating upon law, and fact, and for that purpose separating them from each other, runs through the whole system of the Common Law. At present, however, we allude to it only to explain the practical mode of administering that system. Questions of law are decided solely by the Court *in banc*: i. e. *in banco*—that is, by the Court sitting in, or after, *term time*, at Westminster: questions of fact, in the Courts of Nisi Prius, in London, Westminster, and on the circuit; i. e. before a single Judge, and a jury. There are four of these “terms”—Hilary, Easter, Trinity, and Michaelmas: which originated in the pious deference of our early Judges to certain holy festivals—always *adjourning* at Christmas, Easter, and Whitsuntide. Hence the VACATIONS—or spaces intervening—between the four terms: the “long” one—i. e. between Trinity and Michaelmas—having been from the earliest times allowed for the hay time and harvest.† All the proceedings in an action (except the trial) were, until very recently, *supposed* to take place in term—such having formerly been actually the case. The two circuits occur in the spring, and the summer—but of this more hereafter.

Such being an outline of the history, and existing state of our Common Law Courts, of their Judges and officers, and their mode of administering the law, let us proceed to describe the *subject-matters* with which they have to deal. And first, of ACTIONS.

As the mode of proceeding for redress in Equity, is by “SUIT,” so that at Law, is by “ACTION”—of which the

* Plac. Abr. 40; Linc. temp. 4 Johann. Both these instances are cited from Mr. Serjeant Stephens’ Treatise on Pleading, Appendix, note (9).

† Smith’s Elem. View of An Action, p. 12 (2d ed.).

most ancient definition—that of the *Mirror**—appears to us the best—i. e. “THE LAWFUL DEMAND OF ONE’S RIGHT”—or as Bracton and Fleta express it, in the words of Justinian,† “*jus prosequendi in judicio, quod alicui debetur.*” Of these actions there are three grand classes, called REAL, PERSONAL, and MIXED, following, as the words import, the well-known division of property into real and personal. In early times, our ancestors recognised no other distinctions of property than that into ‘tenements and hereditaments,’—and ‘goods and chattels;’ and the account given by Mr. Williams, in the excellent work already referred to,‡ of the substitution of the terms ‘real and personal property,’ for those formerly in use, is interesting and satisfactory. After the abolition of feudal tenures in the reign of Charles II., it became obvious that the essential difference between lands and goods was to be found in the remedies for the deprivation of either: that land could always be restored, but goods could not: that as to the former, the *real land itself* could be recovered, but as to the other, *proceedings must be had against the person* who had taken them away. The two great classes of property accordingly began to acquire two other names more characteristic of their difference. The remedies for the recovery of land had long been called “*real actions* ;” and the remedies for loss of goods, “*personal actions* :” but it was not until the feudal system had lost its hold, that lands and tenements were called “*real property*,” and goods and chattels “*personal property*.” The Legislature, courts of justice, lawyers, and the owners of property, gave themselves, in the early times

* Ch. ii. § 1 ; 3 Bla. Comm. 116.

† Instit. 4. b. pr.

‡ Williams's Principles of the Law of Real Property, pp. 6, 7.

referred to, small concern about moveable or personal property—which was regarded as of a very limited and insignificant character. This consideration serves to explain the great number of comparatively trivial offences which were, in former times, attended with the forfeiture of all the culprit's *goods and chattels*. During the early feudal times, when no profession was deemed honourable except that of arms; when a separate jurisdiction and a petty tyrant were to be found in every manor, and the Court at which the injured trader must have sought redress from the oppression of a powerful baron, was presided over by that very baron, or his deputy, it is obvious that there could be little safety—little room for commerce; and we find, accordingly, that it was almost totally neglected. Most of that which did contrive to struggle into existence, was in the hands of Jews, and foreigners; the former of whom were the inventors, or at least the first to make use, in this country, of bills of exchange,* as were the latter, of policies of insurance. The native traders were to be found nowhere but in the cities and free towns—whose municipal privileges enabled them to afford security to the persons and properties of their inmates, against the grasp of feudal oppression: and which, though in latter times these exclusive rights may have acted disadvantageously on commerce, were, in those early and distracted times, its nurseries and safeguards.† Thus it comes to pass, that the higher we go in our old law books, the less we hear of the subject-matter of personal, the more of real,

* The first case concerning bills of exchange to be found in our law books, occurs no earlier than the year 1608—9, i. e. in the sixth year of James I. It is the case of *Martin v. Bourne*, Croke. Jac. 6; and the action was upon a foreign bill of exchange.

† Smith's Merc. Law, Introd. pp. 9, 10 (3d ed.).

actions. Of the former, indeed, there were only four or five—*e. g.* Account, Debt, Detinue, Trespass, and Covenant—which, of a remote and undefined antiquity, had provided for the most obvious kinds of wrong.* Towards the close of the thirteenth century, however, it was found that a multitude of cases had arisen, of injuries new in their circumstances, but to which the old forms of action were inapplicable; and that either from timidity, or indolence, the officers of the Court of Chancery were very reluctant to frame new writs adapted to the special circumstances of particular cases; which, it would seem, they were bound to do, by the Common Law. The officers in question were the clerks in Chancery; who, on the authority of Fleta, are declared by Sir Edward Coke† to have been “grave, wise, and circumspect men, sworn to the King, and of profound knowledge in the laws and customs of England.” The new writs which they thus only occasionally drew, in difficult cases, bore the name of “*Brevia Magistralia* :” these clerks being called, on account of their great knowledge, “*Magistri Cancellariæ*.” It would certainly therefore appear, that the mere circumstance of there being no form of writ to be found in the ancient *Registrum Brevium*,‡ fitting the precise circumstances of the plaintiff’s case, did not disentitle him to proceed upon an action on the case, at *Common Law*.§ It is indeed an established maxim, that *wherever the Common Law gives a right, or prohibits an injury, it also gives a remedy by action*,|| and,

* Stephen on Plead. p. 6 (3d ed.).

† Webb’s Case, 8 Co. 49.

‡ All forms of writs once issued were entered, from time to time, in the Court of Chancery, in a book under this name, first printed and published in the reign of Henry VIII. 4 Reeves, 426—432.

§ Per Blackstone, J., in *Kinlyside v. Thornton*, 2 W. Bl. 1113.

|| Per Holt, C. J., in *Ashby v. White*, 1 Salk. 21; *Hunt v. Dorman*, Cro.

therefore, wherever a new injury is done, a new method of remedy must be pursued. To put an end, however, to the doubts, and "to quicken the diligence"* of the clerks in Chancery, the Legislature interfered: and in the year 1285 it was thus enacted, by stat. 13 Edw. I. c. 24:—

"Whensoever henceforth it shall fortune in the Chancery, that in one case a writ is found, and *in LIKE CASE, falling under like law, and requiring like remedy*, is found none, the clerks of the Chancery shall agree in *making* a writ, or shall adjourn the plaintiffs until the next Parliament, and the cases shall be written in which they cannot agree, and be referred until the next Parliament: and by consent of men learned in the law, a writ shall be made; that it may not hereafter happen that the King's Court should fail in ministering justice unto complainants." This enactment, characterised by equal conciseness, boldness, and caution, affords a striking instance of the wisdom by which the councils of that great monarch Edward I. were directed. It is "a provision," observes Mr. Justice Blackstone (3 Comm. 52), "which, with a little liberality in the judges, by extending, rather than narrowing the remedial effects of the writ, might have effectually answered all the purposes of *a court of equity*; except that of obtaining a discovery by the oath of the defendant. The principle sanctioned by this statute, was the framing new writs "*in consimili casu*"—upon the analogy of actions previously existing. In casting their eyes at the old family of actions, that of *trespass* seemed best calculated for

Jac. 478; 3 Bla. Comm. 109, 123. "Unless it be shown by authority," said Mr. Justice Le Blanc, in *Birkley v. Presgrave*, 1 East, 229, "that the action does not lie, we must PRESUME THAT IT DOES: upon the common principle of justice, that where the law gives a right, it also gives a remedy."

* 3 Bla. Com. 51.

the exercise of the new powers given to the clerks in Chancery, as affording the most extensive analogies: and in a short time they had devised a great number of new writs, which came at length to be denominated Writs of "*Trespass upon the case*" (*brevia "de transgressione super casum"*); and the injuries which were the subjects of such writs were called, not "trespasses," but "*torts, wrongs, and grievances*:" and the length to which this system has been carried, may be understood from the fact, that for centuries, the breach of any *contract*, whether express or implied, provided it be not by deed, constitutes one of these "wrongs," and is remediable by means of one of the actions of trespass on the case, called *Assumpsit*—of which we shall hear more presently.

All these actions, real, personal or mixed, were, and (with the exception of *personal* actions) continue to be, commenced by means of an ORIGINAL WRIT (*Breve Originale*). The maxim "*Non potest quis sine BREVI agere*,"* was, says Blackstone,† introduced by the Normans; who held that it was unfit that proceedings in common pleas should be heard before the king's justices, who, being only the substitutes of the crown, ought to take cognizance of nothing but what was thus expressly referred to their judgment. Hence the BREVE ORIGINALE, or "*original writ*," was the foundation of the jurisdiction of the court; and is defined to be a mandatory letter issuing out of the Court of Chancery, under the great seal, and in the king's name, directed to the sheriff of the county where the injury was alleged to have been committed, containing a *summary statement of the cause of complaint*, and requiring the sheriff to command the defendant to satisfy the claim: if he refused,

* Bracton, 413 b.

† 3 Bla. Comm. 273.

then to summon him to appear in one of the superior courts of common law, and there account for his non-compliance with the sheriff's command.* These original writs, containing each a summary statement of the cause of complaint, had the effect of defining and limiting the right of action itself; whence the enumeration of *writs* and of *actions*, becomes identical.† In the course of time, however, there arose a great number of other writs, called writs of [*mesne*] *process*, for the purpose of enforcing the appearance of the defendant, and of such an intricate and varied character, that even the same court had a considerable variety in the method of doing so very simple a thing as the *summoning a defendant before it* ! It is to these that the Commentator alluded, in the elegant passage already quoted, (*antè* p. 399) as constituting the “winding and difficult approaches” to the legal fabric—to the Temple of Justice. This great defect in the practical administration of justice in the courts of common law, was one of the earliest which attracted the attention of the Commissioners appointed, in 1829, to review, report upon, and suggest the improvements which were requisite in the administration of the common law; and their account of the then existing varieties of process is briefly given in the note underneath.‡

* Great uncertainty exists as to the origin of these ancient writs. Some eminent authorities declare that these writs had their origin in the ancient Roman law; and were in use long before the time of the Conqueror: while others as confidently assert that we derived them, through Normandy, from a Francic source. A brief but very able and interesting account of this matter will be found in Note ii., in the Appendix to Stephen on Pleading.

† Stephen on Pleading, p. 8.

‡ “The varieties of process in personal actions, may be summed up thus:—In each of the Courts the proceedings against attorneys and officers, in the King's Bench and Exchequer, that against prisoners also, is by Bill, without process; and in other cases, their processes, or modes of commencing the suit, are as follows:—

We have now, however, arrived at the point where we may best introduce a slight and popular sketch of those extensive improvements in the administration of the

IN THE KING'S BENCH.

By original—

Original Writ adapted to the Action.

By Bill—

- | | | |
|----------------------------|-----|--|
| 1. Attachment of Privilege | . { | 1. With <i>ac etiam</i> , or bailable. |
| | | 2. Not bailable. |
| 2. Bill of Middlesex | . { | 1. Bailable. |
| | | 2. Not bailable. |
| 3. Latitat | . { | 1. Bailable. |
| | | 2. Not bailable. |
| 4. Bill and Summons. | | |

IN THE COMMON PLEAS.

By Original—

1. Original Writ adapted to the Action.
2. Original Writ, *Quare clausum fregit*.
3. Common Capias . {

1. Bailable.
2. Not bailable.

By Bill—

1. Attachment of Privilege.
2. Bill and Summons.

IN THE EXCHEQUER.

1. Venire ad Respondendum.
2. Subpoena ad Respondendum.
3. Quo minus capias.
4. Venire of Privilege.
5. Capias of Privilege.
6. Bill and summons.

“ . . . Having thus shown that there is an inconvenient and unnecessary variety in the several primary writs of process in personal actions, and that each of them, individually considered, is also open to considerable objection, we beg leave to recommend, as the first and most obvious amendment in this branch of the law, that as the object of all these writs is either simply to enforce the defendant's appearance, or to enforce it in such a manner as to obtain security at the same time for ultimate execution on his person in satisfaction of the debt, so the primary forms of process should be reduced to two, viz. *Summons* and *Capias* ; the former to be used where the plaintiff intends merely to compel appearance, the latter where (being entitled to proceed by way of arrest) he has it in view also to secure the defendant's person.”—*First Report of the C. L. Commissioners*, p. 74. [This suggestion, as will be presently seen, was adopted.]

common law, since the year 1829, to which we have already several times adverted, particularly in the introductory chapter,* and in the immediately preceding pages of this chapter.

In 1830 three additional puisne judges were appointed, one for each of the three superior courts; making five judges for each. Only *three* puisne judges were thenceforth to sit at once, with the chief, in banc; and one of such puisne judges was empowered, whenever there should be a pressure of business during the term, to sit apart during term, and decide matters as effectually as the full court: and by a recent act (1 & 2 Vict. c. 32) all the courts may sit in vacation, for the purpose of despatching any arrears of business depending in them. All the judges of all the courts were empowered to try causes pending in any of the three courts in London and Westminster; and to transact such business depending in any of the three courts, as relates to matters “over which the courts have a *common jurisdiction*.” To secure uniformity in the practice of the courts, the judges of the three courts, or any eight or more of them, are empowered to make RULES regulating the practice of all the three courts.—This power they have repeatedly and most beneficially exercised. Very shortly after the passing of the act empowering them to do so, and at intervals during the ensuing four years, they framed a body of *REGULÆ GENERALES*, which completely remodelled the whole course of practice, and assimilated that of the different Courts; vastly lessening the expense, and simplifying and accelerating all the proceedings in an action.

* *Ante*, pp. 20, *et seq.*

Then the **TERMS** were altered *and fixed* ;* and most of the steps in an action (except those which require the immediate intervention of the court) may now be taken during Vacation. This change, also, has removed a great source of inconvenience, delay, and injustice.

The jurisdiction of the courts at Westminster was extended to Wales and Chester; the ancient jurisdiction of the Court of Session of the latter, and of the principality of Wales, being abolished.

The Court of Exchequer at Westminster, which till then had been almost entirely useless as a court of common law, was in 1830 opened to the whole profession; and from that moment became, and has ever since continued, as efficient a court, with *at least* as large an amount of business, as either of the other two. It was stripped of its equity jurisdiction, as we have seen (*ante*, p. 359) in 1841; and now is confined to common law, and suits relating to the *Revenue* of the Crown, which, the reader will recollect, was its original and exclusive province. In the same manner in which the Court of Exchequer was thrown open to the whole profession in 1830, the practice of the Crown side of the Court of Queen's Bench was on the 31st May, 1843, opened to the profession generally, by stat. 6 & 7 Vict. c. 20; which abolished the institution of '*clerks in court*.' The Court of Common Pleas has, in spite of the excellence of its judges, much less business than the other two, in consequence of its not being open to the whole bar. As we have already explained, none but serjeants (of whom the number in practice is, it is believed, about

* Hilary Term now begins 11th January, and ends 31st Jan.

Easter Term . . . 15 April . . . 8 May.

Trinity Term . . . 22 May . . . 12 June.

Michaelmas Term . . . 2 Nov. . . . 25 Nov.

fifteen only) can at present practise there. It was suddenly opened to the whole profession, on the 25th April, 1834, by royal warrant. The serjeants, however, after an acquiescence of five years, successfully impeached the validity of the warrant; denying the authority of the crown to issue it, and insisting upon their right to the monopoly of practice in the court. This was conceded to them; and ever since the 11th January, 1840, the court has remained closed. (See 10 Bing. 571; 6 Bing. N. C. 187, 232; and Mr. Serj. Manning's "*Serviens ad Legem*," *passim*). This is greatly to be regretted; and some even of the judges of the court, it is believed, and also of the serjeants, are favourable to the re-opening of the court to the whole bar.

Lastly, the process of APPEAL, on Writs of Error, from any one of the superior courts, was made very simple and direct. On a writ of error from any one of these courts, the court of appellate jurisdiction is the Court of Exchequer Chamber; consisting of the judges of *the other two courts*; and from the Exchequer Chamber, a writ of error lies to the House of Lords.

The chief of these changes were effected by stat. 11 Geo. IV. and 1 Will. IV. c. 70, which was passed on the 23rd July, 1830: and they have been followed up by other excellent alterations, which have been attended with the happiest results. Many salutary reforms have been since effected, with reference to the officers of the courts—particularly sheriffs and attorneys, with a view to securing the more effectual discharge of their duties; and numerous sinecure offices have been abolished. The number of judges, however, is still scarcely adequate for the due discharge of the judicial business of the country, though they are incessantly active

both in term-time and vacation. By the body of Rules which they have made, they have succeeded in securing almost a complete conformity between the practice of the three superior courts; and the progress of actions, in all their stages, has been prodigiously accelerated.

The next alteration of importance was effected early (23rd May) in 1832, by stat. 2 & 3 Will. IV. c. 39; and consisted in rendering UNIFORM the PROCESS of the Courts for the commencement of *personal* actions. This statute required all such actions to be thenceforth commenced by one of two writs: a *Writ of Summons*; or, in bailable cases, a *Writ of Detainer*. Subsequently, however—viz., on the 16th August, 1838—the Writ of Detainer was abolished by the stat. 1 & 2 Vict. c. 110, § 2, enacting, that from the 1st October, 1838, ‘all personal actions in the superior Courts of Law at Westminster, shall be commenced by Writ of Summons.’ Here we must offer a suggestion of considerable practical importance to the student.

Before the passing of the Uniformity of Process Act, (2 & 3 Will. IV. c. 39,) the writ was merely process to bring the defendant into Court; and, that end having been attained, the plaintiff was at liberty to declare in any form of action suitable to his case, without reference to that which might have been named in the writ. But since, and by the express enactment, of that act, *the Writ of Summons is the commencement of the action*, and must specify the form of action adopted in the declaration: otherwise the latter may be set aside as irregular—not being warranted by the writ which called the defendant into Court.* Here follows a copy of this signi-

* *Thompson v. Dica*, 1 Cr. & Mee. 768.

ficant document. It should be committed to memory by the student. Brief and simple though it be, there is scarcely a single word of it which has not formed the subject of frequent decisions by the Courts; and such continues to be the case: almost the minutest conceivable variation from the prescribed form, affording ground for setting aside the writ, as irregular. *

“ Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To Solomon Squitts, of Watling-street, in the City of London, Greeting. We command you, that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of [Queen’s Bench], in an action of Debt, at the suit of Simon Snooks. And take notice, that in default of your so doing, the said Simon Snooks may cause an appearance to be entered for you, and proceed therein to Judgment and Execution. Witness Thomas Lord Denman, at Westminster, the tenth day of April, in the year of our Lord one thousand eight hundred and forty-five.”

Memorandum to be subscribed on the Writ.

N.B.—“ This Writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.”

INDORSEMENTS.

“ This Writ was issued by Francis Jones, of Lime-

* The Romans were equally strict in requiring accuracy in drawing up their writs (*in actione, vel formulâ concipiendâ*). If there was a mistake in one word, the whole cause was lost. *Cic. de Invent.* ii. 19; *Herenn.* i. 2; *Quinct.* iii. 8; vii. 3, 17. *Qui plus petebat, quàm debitum est, causam perdebatur* (*Cic. pro Q. Rosc.* 4)—vel, *formulâ excidebat* (*Suet. Claud.* 14).

street, in the City of London, Attorney for the said Simon Snooks.”

“The Plaintiff claims 500*l.* 0*s.* 0*d.* for debt, and 2*l.* 0*s.* 0*d.* for costs, and if the amount thereof be paid to the Plaintiff or his Attorney within four days from the service hereof, further proceedings will be stayed.

“This Writ was served by me, Timothy Tibbs, on Solomon Squitts, on Tuesday, the eleventh day of February, 1845.”

So much for the simplification of *process*. In the ensuing year, viz., on the 24th July, 1833, by Stat. 3 & 4 Will. IV. ch. 27. sec. 36. all real and mixed actions, except two of the former, viz. Dower, and Quare Impedit, and one of the latter, viz. Ejectment, were abolished from and after the 31st December, 1834. A long catalogue of these ancient and intricate actions was given (*ante*, p. 24, *note*). The result of this sweeping change is, that there are left only some nine or ten forms of action for the redress of all imaginable injuries remediable by an action at law!—Of these, however, presently. Another statute was passed a few months subsequently to that last above mentioned, viz. on the 14th August, 1833 (stat. 3 & 4 Will. IV. c. 42) which fully justifies the title it bears, of “An act for the further amendment of the law, and the better advancement of justice.” This act is a masterpiece of legislation: and on looking at it, one cannot but exclaim, with a sigh, *O si sic omnia!* In forty-five brief perspicuous sections, it carries into effect nearly two-thirds of all the most important changes recommended by the learned common law commissioners. It first recites the necessity for ‘altering pleadings;’ and that ‘questions to be tried by the jury, ought to be left less at large than they

then were, according to the course and practice of pleading in the several forms of action : ' and then proceeds to empower all the common law judges to frame rules altering the entire system of pleading, and other proceedings, in the courts at law. This they were to do within five years' time ;* and when completed, their rules were to be laid before Parliament for six weeks ; at the end of which time they were to become the law of the land, as if they had been expressly enacted by Parliament. By Hilary Term 1834, the judges had completed a series of *NEW RULES*, which in due time became, and continue, the law of the land—having effected a wholesome and thorough reform of the entire system of pleading. An outline of the policy on which they are based, was given in an early part of this work.† Their sufficiency has been abundantly tested, and their excellence established, during the twelve years which have elapsed since they were promulgated. These most important and truly admirable rules, which are now well understood and appreciated by the profession, will be found in the Appendix : and we earnestly intreat the student's thoughtful perusal of them.

A multitude of other capital improvements in the law were effected by this celebrated statute ; amongst which may be mentioned the power conferred on the judges to order Writs of Enquiry to be executed, and actions for sums not exceeding twenty pounds to be tried, before the sheriff (§ 17), and on a very low scale of costs. This latter provision has destroyed all pretence for calling for the establishment of local courts. Another most important and beneficial power is conferred on a judge at Nisi Prius,

* This period was subsequently extended by stat. 1 & 2 Vict. c. 100, § 1, for a further term of five years.

† *Ante*, pp. 25, 26.

by § 23, to allow amendments to be made in the record under due limitations, whenever there happens to be a variance between the evidence adduced, and the allegation on the record. This is a compensating provision, for the great strictness in pleading required by the new rules. Again: whenever parties can, after they have joined issue in their pleading, agree upon the *facts*, they may at once state a case for the opinion of the court (§ 25), and thus are saved all the expense, anxiety, risk, and delay, of a trial.—Important improvements are also effected in ARBITRATION proceedings by §§ 39—41. In short this statute * will remain a model of legislation for all future law reformers. The excellence of its multifarious provisions has been demonstrated by the experience of the last twelve years; during which period, moreover, the march of improvement has been sustained by the Judges, and (with some presumed exceptions) by the Legislature. To particularise them, however, would be inconsistent with our present limits. We have, moreover, already cursorily alluded to several of the other leading changes recently effected—especially in the case of INTERPLEADER (*ante*, pp. 26, 27—315, 316); for SPEEDY EXECUTION upon judgments; the removal of the incompetency of witnesses on the ground of interest or crime; the improvements on the processes of *Mandamus* and *Prohibition*; and the important changes effected by the late Bankruptcy Statutes. We trust that the outlines which have been traced thus rapidly and imperfectly, will satisfy the student of the truth with which, at the commencement of this work (*ante*, p. 21) we stated that there had been effected “a real reform—a practical, searching, comprehensive reform of the Common

* It does not extend to Ireland or Scotland (§ 45).

Law ;" such as can be fully appreciated by none so well as by those who commenced their studies and their practice under the former system.

Let us now, however, return to the subject of ACTIONS ; which, by the means above described, have been reduced into so narrow a compass, as to admit of our treating them with brevity. *Real* Actions are brought for the specific recovery of real property only : *Mixed* Actions, for the specific recovery of real property, and also of damages against the party detaining it : *Personal* Actions, for the recovery of personal property, or of damages for some injury, in respect of the person, or personal rights, or in respect of real or personal property. Of these in their order.

I. REAL ACTIONS.* These are called in the *Mirror*, *Feodal* Actions.† Out of nearly sixty, it has been thought fit by the Legislature to preserve only two—namely, those of DOWER, and QUARE IMPEDIT. The former is brought by a widow to compel the due assignment of her dower : the latter, by a person complaining that he has been improperly deprived of ecclesiastical patronage. By means of this latter action is tried and decided a disputed title to an advowson. Both these actions are of very rare occurrence ; principally because questions of this sort arise between members of the higher classes of society, in cases where their rights are generally ascertained, with inevitable precision, by solemn written documents, so as often to preclude the necessity for

* The Romans also divided their actions into three classes—Real (*Actio in Rem*), Personal (*Actio in personam*), and Mixed. See them explained in Adam's Roman Antiquities, pp. 211—222 (9th ed.).

† *Mirr.* c. ii. § 6 ; 3 *Bla. Comm.* 117.

litigation. We have been able to discover only seven cases of *Quare Impedit* in the Common Law Reports for the last fourteen years.* Two of these decided questions of equal difficulty, interest, and importance. That of *Edwards v. The Bishop of Exeter*, 5 Bing. N. C. 652, establishes, that where a Protestant and a Catholic are co-patrons of an advowson, the right of presentation is in the Protestant alone. That of *Mirehouse v. Rennell*, (on Error,) 8 Bing. 490, decides, that an advowson belongs to a prebendary, in right of his prebend; and that, on the church becoming vacant, if the prebendary die without having presented, the presentation *belongs to his personal representative*. This was a case of extraordinary difficulty. The decision of the Court of Common Pleas (3 Bing. 223) to the contrary, was not unanimous: Mr. Justice Gazelee dissenting from the rest of the Court. The decision of the Court of King's Bench (7 B. & C. 113) on error,† reversed that of the Common Pleas; but Lord Tenterden dissented from the rest of the Court. Of the eight Judges who delivered their opinions in the House of Lords, two (Mr. Baron Bolland and Mr. Justice Park) dissented from the majority of six, whose opinion, confirming that of the King's Bench, was adopted by the House of Lords. (8 Bing.

* *Mirehouse v. Rennell* (*ut supra*), *Edwards v. Bishop of Exeter* (*ut sup.*); *The King v. Arch. York*, 1 Ad. & Ell. 394 [this was a case of simony, and the difficult *declaration*, drawn by two consummate pleaders, Mr. Tidd and Mr. Chitty (*vide* 3 Chit. Pl. 1209, 6th ed.), is given at length at pp. 398, *et seq.*]; *Earl of Harrington v. Bishop of Lichfield*, 4 Bing. N. C. 77; *Barnes v. Jackson*, 1 Bing. N. C. 545; *Appleby v. Bishop of Hereford*, 9 Bing. 681; *The Queen v. Chapter of Exeter*, 12 Ad. & Ell. 512. The last case is interesting, as illustrative of the principles upon which the courts act in refusing to grant a *Mandamus*, as they did on that occasion: viz. because there was another legal remedy for the party—by *Quare Impedit*.

† This was before the recent alteration in the course of Appeal (*ante*, p. 456).

490.) This case was argued, both at the bar and on the bench, with profound learning, and immense research; and the language of the different Judges will be found highly illustrative of the principles governing the judicial decision of 'new cases.'

The chief reason of the infrequency of actions of Dower, is, the concurrent jurisdiction of Equity, in such cases—where far greater facilities are afforded to a widow, than she can obtain at law. She is, on the contrary, often seriously embarrassed by the proceedings necessary in an action at law; being unable to discover the titles of her deceased husband, and the lands out of which she claims her dower (on account of the title-deeds being usually in the hands of heirs, devisees, or trustees); or to ascertain the comparative value of different estates; or to obtain a prompt and fair assignment of her 'third part.'* In respect of all these matters, a Court of Equity affords her prompt and effectual assistance.—It remains to observe that these two real actions can be brought in the Common Pleas only; but ejectment may be brought in any of the three Superior Courts; for which, and other reasons, Mr. Serjeant Stephen insists that ejectment is really a *personal*, and not a mixed action.†

The forms of the declaration in these actions, which are commenced, as of old, by original writ, will be found in the Appendix.‡

II. MIXED ACTIONS. The only surviving one is that of Ejectment. The origin and growth of this action is curious and interesting, and will be found very well given by Mr. Serjeant Adams in the opening chapter of

* See Mitford's Pl. Eq. (by Jerem.) pp. 121 *et seq.*; and 1 Stor. Eq. Jur. 504.

† 3 Comm. 460.

‡ See App.

his Treatment on Ejectment. Its technical definition is, 'An action in which a tenant for a term of years claims damages for a forcible ejection, or ouster, from the land demised.' It was invented in the reign of either Edward II. or in the beginning of the reign of Edward III., in order to enable suitors to escape from the "thousand niceties with which (in the language of Lord Mansfield *) Real Actions were embarrassed and entangled"—and which, moreover, were cognizable in the Court of Common Pleas only : and in order to foster this form of action, the Courts early determined (*circa* A. D. 1445—1499) that the plaintiff was entitled to recover not merely the *damages* claimed by the action, but also by way of collateral and additional relief, *the land itself*. This form of action is based entirely upon fiction. A sham plaintiff (John Doe) pretends to be the lessee of the real claimant, and alleges that he has been ousted by a sham defendant (Richard Roe), who is called the 'casual ejector' ; and in conformity with this notion, a Declaration is drawn up, which is served upon the party actually in possession. It is the business of this person to defend the action, or, if he be only the tenant of the real defendant, to give him due notice of the proceeding. As soon as this has been done, John Doe and Richard Roe disappear—the names of the real parties are substituted—and the action proceeds in the ordinary way, at once to trial. Lord Mansfield thus felicitously described and illustrated this quaint and singular action :—"An ejectment is an ingenious *fiction* for the trial of titles to the possession of land. In *form*, it is a trick between two, to dispossess a third, by a

* *Faireclaim v. Shamtitle*, 3 Burr. Rep. 1295.

sham suit and judgment. The artifice would be criminal, unless the *Court* converted it into a *fair* trial, with the *proper* party * * The great advantage of this fictitious mode of procedure is, that, *being under the control of the Court*, it may be so modelled as to answer, in the best manner, every end of justice and convenience * * The control which the Court have over the judgment against the casual ejector enables them to put any *terms* upon the plaintiff which are just. He was soon ordered to give *notice* to the *tenant in possession*. When the tenant in possession *asked* to be admitted defendant, the Court was enabled to impose *CONDITIONS*; and therefore obliged him to *allow* the fiction, and go to trial upon *the real merits*, * * without being entangled in the niceties of pleading on either side." * Except in the two cases of *Dower* and *Quare Impedit*, an action of ejectment is *now*, since the abolition of real and mixed actions, the only remedy for the specific recovery of land. The form of the declaration in this case becomes very intelligible and easy to use, as soon as the true nature of the fiction on which it depends is understood. † The principal practical points of importance in drawing the declaration, are two—to lay the date of the fictitious demise consistently with that at which the real plaintiff's right of re-entry had accrued; secondly, to have the *demises* to the fictitious plaintiff in the names of the proper claimants. The following are the three grand rules governing the application of an action of ejectment:—

1. The plaintiff must recover on the strength of his own title, not the weakness of the defendant's; for he, being

* Per Lord Mansfield, C. J., in *Fairclain v. Shamtitle*, 3 Burr. 1294; and in *Aslin v. Parkin*, 2 Burr. 668.

† See the form of it in the Appendix.

in possession, is presumed to be rightfully so, till the contrary shall have been proved by his opponent. This principle we have adopted from the very earliest period of the Roman Law ; for, by the law of the Twelve Tables, the presumption was declared to be always in favour of the possessor. “*Si qui in jure manum conserunt, secundum eum QUI POSSIDET, vindicias dato.* (Gell. xx. 10.)—2. The plaintiff must have a strict *legal* title to the lands: *i. e.* no equitable title will avail. (*Ante*, pp. 308, 391, (n).)—3. The plaintiff must, as above intimated, have a right of entry upon the lands, at the date of the demise in the declaration.—There can be no special pleading in ejectment ; for the consent-rule compels the defendant to plead only “*Not Guilty.*”—The form of a Declaration in Ejectment will be found in the Appendix.

The report of the English Commissioners, recommending the abolition of all real and mixed actions, except those of Dower, Quare Impedit, and Ejectment, has been adopted, to a considerable extent, by many of the States of America. The Legislature of Massachusetts, for instance, in 1835, have at length, says Chancellor Kent (4 Comm. 71, note *e*), in doing so, “yielded to the current of events, the force of examples, and that innovating spirit of the age, which is sweeping rapidly before it, both in England and America, all vestiges of the ancient jurisprudence.” Several of the States, however, still retain our abolished real actions. In many of them the action of ejectment is retained “with its harmless—and, as matter of history, curious and amusing—English fictions;” while, in others, the fictitious parts of the action are abolished by statute, (*id. ib.*) The following passage, from

the pen of the same distinguished jurist (*id. ib.*), is on several accounts so remarkable, that we present it to the reader:—

“It is a singular fact—a sort of anomaly in the history of jurisprudence, that the curious inventions, and subtle, profound, but solid distinctions which guarded and cherished the rights and remedies attached to real property in the feudal ages, should have been transported to, and should for so long a time have remained rooted in, soils which never felt the fabric of the feudal system; whilst, on the other hand, the English Parliamentary Commissioners, in their report, proposed, and Parliament executed, a sweeping abolition of the whole formidable catalogue of writs of right, writs of entry, writs of assize, and all the other writs in real actions, with the single exception of writs of dower and *quare impedit*. This we should hardly have expected, in a stable and proud monarchy, heretofore acting upon the great text authority of Lord Bacon, that ‘it were good if men in their innovations, would follow the example of time itself, which, indeed, innovateth greatly, but quietly, and by degrees scarce to be perceived’.”

III. PERSONAL ACTIONS. Having thus briefly dispatched the real and mixed classes of actions, that which is now before us must necessarily engage our attention at greater length; for personal actions, and the incidents connected with them, occupy at least two-thirds of the time and attention of the judges, of counsel, and of attornies. By means of these personal actions, redress is obtained for injuries occasioned by direct personal violence, or otherwise, to either one's own person, or one's absolute or relative

rights; for all demands founded upon all kinds of contracts; and for all injuries to personal or real* property. The usual classification of personal actions, is, into those which are founded upon *contract* (*ex contractu*), and those which are founded upon *tort* (*ex delicto*), by which latter term is signified, any wrong or injury *unconnected with contract*. "All civil injuries are of two kinds—the one WITHOUT FORCE, or violence; the other coupled *with force*, or violence: a distinction," says Blackstone, "running through all the varieties of action."† This distinction is, for practical purposes, more appropriate to the class of actions *ex delicto*, than to those *ex contractu*; it being surely superfluous, to describe the mere breach of a contract, as an injury committed *without force*. The distinction, in actions of tort, however, is of capital importance, as will be manifest when we shall have arrived at that branch of the subject. Though this may appear at first to be a division sufficiently simple and easy to be understood, and applied to the ordinary transactions of life giving rise to litigation, the student will soon find it to be, on the contrary, often a matter of great difficulty, and requiring the exercise of much discretion and learning. Of this we shall presently give him several illustrations, arising out of the question, "which is the *proper form of action* to be adopted" in any suggested case. If a wrong one shall have been adopted, all the proceedings will be null and void from the beginning to the end. Cases have occurred in which an unquestionable wrong having been inflicted by the defendant upon the

* The *land itself*, we have just seen (*ante*, p. 466), can be recovered only by an action of ejectment.

† 3 Comm. 119.

plaintiff, he has, through unskilful advice, selected an improper form of action, obtained large damages—and then been deprived of them all by a motion in arrest of judgment, or a writ of error—losing also all the costs expended; and on bringing a second action, in a proper form, the new jury, having been persuaded to take a different view of the same facts, through caprice, the eloquence of counsel, or other causes, have given grievously inadequate—perhaps even only nominal damages! The Courts are inflexible in requiring the boundaries of the different forms of action to be preserved. Into what irretrievable confusion would the law be thrown, were it to be otherwise? And if any, even the slightest departure were to be allowed, under the pressure of particular circumstances, where would it end? Let it be borne in mind, that these forms of action are not mere arbitrary devices, struck off, so to speak, at a heat; but the product of vast experience, learning, and thought, and stamped with the sanction of ages of user, having stood the test of every imaginable degree and species of objection which fertile acuteness and ingenuity could, from time to time, devise. Both the Greeks, and the Romans after them, had set *forms of action* for the redress of injuries, and to which they rigidly required the adherence of suitors. ‘*Actiones*,’ say the Pandects, ‘*compositæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt.*’ Ff. 1, 2, 2, § 6. The policy of such a procedure is thus accurately indicated by Cicero (Pro Qu. Roscio, § 8). ‘*Sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis in genere injuriæ, aut in ratione actionis, errare possit: expressæ enim sunt ex unius cujusque damno, dolore, incom-*

modo, calamitate, injuria, publicæ à prætore formulæ, ad quas privata lis accommodatur. 'All the modern legislators of Europe,' says Blackstone (3 Comm. 117), 'have found it expedient, from the same reasons, to fall into the same, or a similar method.' So sensible have been the administrators of our own law, of the value of such formulæ, that they have been adhered to for ages with an exemplary fidelity. Hence it is, that even the slightest alterations in a form of action are usually introduced—not even by a Rule of Court—but by express enactment of the Legislature. Thus in the Act for the Amendment of the Law (Stat. 3 & 4 Will. IV. c. 42, § 14,) it is declared that an action of *debt*, on simple contract, shall be maintainable against an executor, or administrator. Innumerable declarations by the Judges, of their determination to preserve inviolate the boundaries of the different actions, might be cited. Thus, *Chief Justice Sir Robert Raymond*: "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion."* *Lord Tenterden*: "The law has provided certain specific forms of action for particular cases, and it is of importance that they should be preserved: and we ought to look with great jealousy at any innovation."† *Lord Kenyon*: "It is of importance that the boundaries between the different actions should be preserved."‡ *Chief Justice Eyre*: "Undoubtedly we ought to endeavour to preserve the distinction of actions."§ *Chief Justice Tindal*: "Settled forms of action, adapted to different grievances, must be adhered

* *Reynolds v. Clarke*, 1 Strange, 634.

† *Orton v. Butler*, 5 B. & Ald. 654.

‡ *Savignac v. Roome*, 6 T. R. 129.

§ *Turner v. Hawkins*, 1 Bos. & Pull. 476.

to, for they contribute much to the certain administration of justice." * Nay, so far do the Judges go in this direction, that they have repeatedly, and very recently, decided that they will not, even by the consent and desire of both parties, decide cases in forms of action not legally appropriate to them. Thus in *Ker v. Osborne*, 9 East, 381, we find Lord Ellenborough, C. J., declaring "that the agreement of the parties to rest on the merits, and take no advantage of form, could not bind the Court to give judgment on the merits, when there appeared a clear objection to the form of the action." †

From all this, the student will easily perceive the great importance of acquiring, early, an accurate acquaintance with the forms of these personal‡ actions. *But what does this involve and presuppose?* "In order effectually to apply the remedy," says Blackstone, § "it is first necessary to ascertain the complaint." And what less is required, than an exact acquaintance with no less extensive and important a subject, than that of *the nature of civil rights and duties*, before it can be determined whether there has been any cognizable civil injury inflicted!

Legal rights and duties—the converse of each other—are those which appertain to particular individuals, with reference either to the person, or to personal, and real property. The first comprise both *absolute* rights,—that is, those relating to one's own person,—as personal security of life, body, and limb—liberty, health, and

* *Williams v. Holland*, 10 Bing. 116.

† See also *Marshall v. Hopkins*, 15 East, 309; and several recent cases, the names of which do not at this moment occur to the author.

‡ The nature of the case precludes any difficulty arising in respect of the two real actions, and the single mixed action.

§ 3 Bla. Comm. 118.

character; or *relative* rights, that is, they relate to one's interest in some particular *relation*—as in a wife, child, ward, apprentice, or servant. A man's *duties* towards them constitute their *rights* or claims upon him.—The rights relating to *personal* and *real* property, involve the consideration of the nature of that property itself—the extent of a party's interest in it—and the modes by which rights to it may be acquired and transferred. The nature of the distinctions between these two kinds of property, and the almost endless variety and complexity of relations existing between them, and their owners, or claimants, of course affect the nature of the *remedies* to be adopted—and must be thoroughly well considered, in all their bearings, in any case of difficulty, in order to come to a correct determination upon the nature and extent of the alleged injury, and the species of remedy to be adopted.

Before advising the commencement of legal proceedings, four points require careful consideration. The *nature of the right* affected: the *mode of committing the injury*: the *occasion*, or *purpose*, of committing the injury: and with what *intention*.*

First, as to the *RIGHT* affected. Was it a public right, or a mere private right? Does it regard the *person* of the plaintiff, or his health, or his reputation? Does it regard his interest in a wife—child—apprentice—servant? Is it a right of his own, or belonging to him only in his representative capacity,—as executor, trustee, or assignee? To himself alone, or jointly with others? If relating to real or personal property—is that property *corporeal*, and in the possession of the plaintiff?

* See 1 Chitty's General Practice, pp. 3 *et seq.*

Or incorporeal? Has he only a right, vested, or contingent, to future possession? Is his interest in reversion, or remainder?

Secondly, as to the mode of committing the injury. It may be one of three kinds—*i. e.* by ‘*NON-feazance*,’ which means the simply *not doing* what by legal obligation, or duty, or contract, the defendant ought to have done. Or, secondly, by ‘*MIS-feazance*,’—by which is signified the performance in an improper manner of some act which it was the defendant’s duty, by contract or otherwise, to have done, or of some act which he had a right to do. Or, thirdly, by ‘*MAL-feazance*,’—*i. e.* the unjustifiable performance of some act which the defendant had never any right to do, or had by contract or otherwise divested himself of the right. These several modes of committing private injuries are compensated by peculiar and appropriate remedies; and the form adopted must correctly describe them.

Did the injury, ceasing to be merely *private*, become a *public* one—and amount to a *CRIME*—*i. e.* to felony, or misdemeanour? If private, was it only a tort (*i. e.* a wrong unconnected with contract)—or merely a breach of contract? If the former, was the injury direct or immediate, or only *consequential*? Was it with force? Or without force? by non-feazance, mis-feazance, or mal-feazance? If the latter, viz. a breach of contract—what *kind* of contract was it? One implied, or express? And in the latter case, was it merely verbal, in writing, or by deed?

Thirdly. On what occasion, or for what purpose, was the injury committed: was it *primâ facie* lawful? or *primâ facie* unlawful?

Fourthly. With what *intention*? For though the intent with which an act was done is all-important in criminal cases, and generally speaking immaterial in civil cases, when the act occasioning an injury is, in strictness, illegal; yet there are cases where the *intention* is, in civil cases, of vital importance—as in case of slander, libel, malicious prosecution. In some other cases, also, the *intention* with which an act has been done, may be traversed. See *Griffith v. Harrison*, 1 Salkeld, 196-7 (Per Holt, C. J.), *Lucas v. Nockells*, 10 Bing. 172 *et seq.*

To a certain extent involved in the consideration of these topics, there are certain preliminary questions which always occur to a cautious, thoughtful, and experienced practitioner.

Does any act yet remain to be done on the part of the plaintiff, to enable him to sustain an action?

Has any STATUTORY requisition been overlooked? Any previous TENDER? NOTICE? DEMAND? OFFER? REQUEST? Or, in short, any other step omitted, which is dictated by necessity, or at all events prudence?

And further—has any such essential preliminary not only been attended to, in point of *fact*, but is the plaintiff provided with proper *evidence* of that fact?

How many vexatious and painful cases of defeat and mortification, are these last few questions calculated to bring to the recollection of persons of experienced and extensive practice and observation, in both branches of the profession! Therefore, oh thoughtful student! to be forewarned, is to be forearmed!—Now, however, for the two great classes of actions—those *EX CONTRACTU*, and those *EX DELICTO*.

I. Actions *EX CONTRACTU*. But what is the legal notion

of a Contract?—It may be described as “the mutual assent of two or more persons, competent to contract, founded on a sufficient and legal consideration—*i. e. motive or inducement*—to do some lawful act, or omit to do something, the performance of which is not enjoined by law.”* These are the essential constituents of all contracts: but there are different forms of them; the distinctions between which are clear and decisive, and assign to each class, attributes and consequences of a very important character, particularly with reference to the form of action which must be adopted, to obtain redress for a breach of contract. Let us *first* of all observe, that, in the language of Lord Tenterden,† “there is no distinction between an express, and an implied contract, except as *to the mode of substantiating it*. An express contract is proved by an actual agreement; an implied contract, by circumstances,—as by the general course of dealing between the parties:—but whenever a contract has once been *proved*, the consequence resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence.” *Secondly*. When Acts of Parliament prescribe certain formalities to be observed, as that of the contract being in *writing*, and *signed*; these formalities are not any essential constituent part of the contract, but only necessary EVIDENCE of it. The intrinsic character and effect of the agreement are left untouched.‡ “The forms of writing and signature are certainly essential in the particular cases; but even when

* See Chitty on Contracts, p. 9 (3d ed.), and the authorities there cited.

† Marzetti v. Williams, 1 B. & Adol. 423.

‡ Thornton v. Kempster, 5 Taunt. 788; Egerton v. Matthews, 6 East, 307.

observed, the agreement requires not a tittle more of vigour or force, than such as belong to a contract of that class; and there are still wanting, and must be supplied, all the essential requisites *of a contract*, to give it efficacy. Thus a *consideration* is equally indispensable whether the contract be verbal, or in writing.* *Thirdly*. The construction of contracts is the same in equity, as in law; and whether the instrument evidencing it be a simple writing, or a deed: the intention of the parties must guide the operation of the instrument, as that intention can be collected from the terms of the instrument purporting, or designed, to express it.†

Such being the essential attributes, and the leading incidents, of all contracts, the law recognises three kinds, which govern the remedies for a breach of them: viz., Simple Contracts: Specialty Contracts: Contracts of Record.

I. A SIMPLE Contract signifies one which is *not under seal*: if that be wanting, then it is, at Common Law, immaterial whether the contract is in writing, or only verbal: in either case it passes under the name of a "PAROL CONTRACT"—or "Simple Contract." This was expressly declared, in 1764, to be clearly established law, by Chief Baron Skynner, in the House of Lords, in *Rann v. Hughes*, 7 T. R. 350 (a); S. C. 7 Brown's Parl. Cas. 551; and has never since been questioned.

II. A SPECIALTY CONTRACT, or a Contract UNDER SEAL, is a written Contract SEALED and DELIVERED ‡ over as a DEED, by the person bound, to, or for the

* Chitty on Contracts, p. 5.

† Com. Dig. tit. Agreement, C. 5th ed. Note by Mr. Hammond.

‡ See *Doe v. Knight*, 5 B. & C. 671; *Talbot v. Hodson*, 7 Taunt. 251.

benefit of, the person to whom the liability is incurred : such sealing and delivering being a particular form and ceremony, which entirely alter the nature and operation of the agreement. See the late case of *Davidson v. Cooper*, 11 Mee. & Welsb. 778.—It would be here out of place to specify more than one of the important distinctions between a Specialty, and a Simple Contract. To render the latter obligatory, a *consideration* is absolutely necessary to be proved ; but none need be proved to support the liability created by a Specialty.

III. A CONTRACT, OR OBLIGATION OF RECORD, *i. e.* a Judgment, Recognizance, or Statute Staple, is of superior force, because it has received the sanction, and is founded upon the authority, of a Court of Record :* and constitutes a perpetual, intrinsic, and exclusively admissible testimony of all the judicial transactions comprised in it.† No collateral proof is admissible to impeach its authenticity, or accuracy : and it is binding, even though erroneous, so long as it stands unreversed by writ of error. For this reason, in suing ‡ upon a contract of record, it is unnecessary to state the circumstances, or consideration, on which it is founded.

Now the forms of action *EX CONTRACTU*, are DEBT : DETINUE : COVENANT : ASSUMPSIT.

I. DEBT is by far the most extensive of the actions *ex contractu* ; for it lies to recover money due in respect of certain of all the three kinds of contracts above explained. The usual and technical description of this

* Chitt. on Contr. p. 2.

† Steph. on Plead. p. 25 (3d ed.).

‡ See, however, *post*, p. 480 (n.), as to the impolicy of *suing* upon a judgment.

form of action is, that it is brought for the recovery of a "DEBT:" by this being signified, a *liquidated* or *certain* sum of money alleged to be due to the plaintiff. But observe, that this certainty may be potential, as well as actual: on the maxim "*id certum est, quod certum reddi potest.*" Thus, if I order a pair of boots to be made for me, the maker, having delivered them to me, may sue me in *Debt* for the value of them, though not a word had passed between us, concerning the price, when the order was given. Nay further: if I had ordered only an indefinite quantity of goods,—viz., as many pairs of boots as could be made in a week,—and also without saying anything as to the price to be paid for them, and there was in point of fact no fixed price—in this case also, at the week's end, the seller could sue me in *Debt* on a '*Quantum Valebant,*' for the amount of the boots delivered. *Et sic de similibus.* This was not, however, always so. We find, for instance, in 3 Bla. Com. 155, that to maintain debt, "the quantity must be fixed and specific, and must not depend on any subsequent valuation to settle it:" and that, "if I agree for no *settled price*, I am not liable to an action of debt, but to an action of *assumpsit.*" It is, in short, now a rule, that wherever the demand is for a definite sum, or for a pecuniary demand, which can be *readily reduced* to a certainty, debt lies. However complicated in its terms and arrangements may be either a parol or specialty contract, still if a determinate sum of money be payable by virtue of its provisions, Debt will lie. On all the contracts, express or implied, arising out of the ordinary transactions of life,—viz., of buying and selling, of all sorts of employments for hire,—for money lent, or paid

on behalf of a person ; on bills of exchange and promissory notes, *between the immediate parties* ; on awards directing the payment of a specific sum ; for money due under bye-laws ; for calls ; for tolls ; port dues ; market and other dues ; fines ; and quit-rents.—Upon all sorts of bonds, and deeds—*e. g.* mortgage deeds, annuity deeds, apprenticeship deeds, partnership deeds, leases ; charter-parties and policies of insurance, &c. &c. &c. : on records, or judgments.* On statutes : that is, wherever they direct the payment of money to a party, whether by way of penalty, or otherwise :—so extensive is the sweep of this action of Debt ! The *Declaration* in Debt is often very simple, but sometimes exceedingly special and difficult.—This, however, belongs to a separate department.† In the Appendix will be found three forms of Declarations in Debt. (1.) One of the simplest forms—viz., for goods sold and delivered : (2.) On a *Deed Poll* [*i. e.* a *single deed*—or made by only one party] whereby the testator of the defendants (*executrix* and *executor*) appointed 50,000*l.* to be paid on his death, to the plaintiff.‡ This last precedent was settled by very eminent counsel.§

II. *DETINUE* lies to recover goods, or the value of them, *detained* contrary to a contract express or implied. It is said, in the text-books, to be the only remedy, by

* It is not, however, advisable now to *bring an action* on a judgment, for that course is considered needlessly and oppressively expensive, and is viewed with disfavour by the judges ; who, by statute 43 Geo. III. c. 46, § 4, are empowered to grant costs to, or withhold them from, a successful plaintiff, in such an action, in their discretion.—The more expedient course, therefore, is, to revive the judgment by a *scire facias* ; as to which see any of the books of practice, *ad vocem*, and *post*, pp. 487, 8.

† *Post*, “ Special Pleading.”

‡ *Vide* Appendix.

§ 3 Chitt. Pl. 276 (6th ed.).

action, for the recovery of personal chattels, *in specie*. This, however, is a position at least questionable: for in the case of the *Earl of Falmouth v. George*, 5 Bing. 286, it was decided, that an action of debt would lie for the toll of fish, *in specie*; and in the late case of *Walker v. Needham*, 3 Mann. and Gr. 557, Mr. Justice Maule observed, that even in an action of Detinue, "the plaintiff can recover only the value of the chattels, and cannot by any means obtain possession of the chattel itself." The correctness of this *dictum* will be manifest, on adverting to the nature of the proceedings in Detinue. The declaration claims damages to the amount of the *value* of the articles detained: and the *judgment* is, that the plaintiff "do recover the said goods and chattels—or the said sum of £500, for the value of the same, *if the plaintiff cannot have again his said goods and chattels*, and £——, for damages for the detention of the same." There is, thus, no substantial or practical difference in respect of the *result* of the action, between Detinue and the action of Trover, which will be by-and-by explained.

Again. All the text-books class Detinue among actions *ex Delicto*, instead of actions *ex Contractu*; the writers admitting, at the same time, that it is very difficult to determine to which of the two it belongs. It has been said, that as this action can be combined with that of Debt, it must be an action of the same nature, *i. e.* founded on contract; for none but actions of the same nature can be joined together. It has been urged, on the other hand, that the *gist* of the action of detinue is the *wrongful detainer*, which savours wholly of tort: for that the "bailment" or *delivery* alleged in the declaration, is mere form, and cannot be traversed. This view of the case has been taken by the courts in

[illegible]

or otherwise separated and distinguishable from other money; and so of other articles—as books, animals, &c. &c. &c. The pleadings in both Detinue and Trover are founded on fiction. That in Trover is, a supposed *loss* of the goods by the plaintiff, and '*finding*' of them by the defendant; that in Detinue, a supposed '*delivery*' or *bailment* of them, by the plaintiff to the defendant.*

III. COVENANT. A Covenant is a contract under seal. "A promise," says Blackstone,† "is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same." It may be an *express* covenant, or one implied by law, (called, then, a '*covenant in law*') between two or more persons, from certain technical expressions used in an instrument under seal. For the violation of agreements of this kind, the law has provided a remedy by an action of Covenant, wherein the plaintiff may recover DAMAGES commensurate with the loss sustained. In the action of Debt, the debt itself, as we have seen, is the object of the action; the damages for detaining it being only nominal, except when the jury, in pursuance of the Statute 3 & 4 Will. 4, give *interest* by way of damages: but in Covenant, *damages* are the substantial object of the action. The rules respecting this form of action are few and simple. It is a remedy concurrent with *Debt*, for the recovery of any clear *money* demand, payable by express or implied covenant: in all other cases of covenants, this is the exclusive form of action. In the Appendix will be found a Declaration of Covenant on a Lease, by a landlord against his tenant.

IV. ASSUMPSIT. By this action are recovered Damages

* See the form of a Declaration in Detinue, in the Appendix.

† 3 Comm. 158.

for the Breach of a Contract not under Seal (*i. e.* a simple contract), for the payment or repayment of money, or the lawful performance or non-performance of any other act. By means of this sort of contract, either *implied* or expressed, are carried on two-thirds, if not a still greater proportion, of the ordinary transactions of mankind, whose hurried exigencies will not admit of their entering, except on special occasions, into the more deliberate and solemn forms of engagement which we have been recently considering. This form of action is, as we intimated in a former page,* and as Tindal, C. J., observed in *Richards v. Stuart*, 10 Bing. 320, a leading *species* of that extensive *genus* of actions called Trespass on the Case. The general adoption of this form of action, in case of a simple contract for a money demand, appears to date from comparatively a recent period, viz., A. D. 1602, towards the close of the reign of Queen Elizabeth, when it was held by the Court of King's Bench,† that the plaintiff might, in such a case, bring an action either of debt, or assumpsit. From that time—at all events, from the early part (*anno tertio*) of the reign of James I.—it came into more frequent use,‡ and is now grown into such favour, that it is of all but universal adoption wherever it is applicable. It derives its name from the leading word "*Assumpsit*," which, when the pleadings were in Latin, was always inserted in the declaration to describe the defendant's "*undertaking*:" *i. e.*, "*promisit et super se assumpsit*."§ When it is re-

* *Ante*, p. 451.

† *Slade's Case*, 4 Co. 91—95.

‡ *Walker v. Witter*, Doug. 6.

§ The following is the form of one of these Declarations, which is worth the student's notice as a choice specimen of legal latinity. It is extracted *verbatim et literatim* from the "*Instructor Clericalis*, vol. ii. p. 121 :—

"— ss [*i. e.* scilicet—'to wit'] A. B. nuper de C. in com. pd. &c.,

collected that this action lies in all cases of contracts, implied or express, which are not under seal, or of record, it will be at once seen how superfluous must be the specification of the particular cases in which it can be maintained. It lies, concurrently with Debt—each in a very simple compendious form—on contracts express or implied respecting the sale, or use, of real or personal property; for tolls, port-duties, calls due on shares, &c. &c.; for remuneration for *personal services*, by attornies and solicitors, proctors, surgeons and apothecaries, * surveyors, auctioneers, schoolmasters, builders, accountants, agents, brokers, factors, carriers, book-keepers, &c. &c.; and for all the usual money demands—such as for money lent, money paid, money had and received to the plaintiff's use, of which last we gave (*ante*, p. 320 *et seq.*) a particular explanation, &c. &c. In all this vast class of cases, the Declaration is equally short and simple in Debt and Assumpsit—extending to only a few lines. There are, however, a great number of cases in which the declaration must be in a *special* form, instead of in the compendious *common* form above described. When must the one be

attachatus fuit ad respond. E. de plito transgressionis super casum, &c. Et unde idem E. per — Attorn. suum, queritur quare cum prædictus E., 10mo Sept^{is} die A. R. D. R. nunc primo, apud &c., ad special' instanc' et requisition' prædict. A. B., vendidisset et delibasset eidem A. B. unum equum color' nigr' precii decem libr' legalis monete Angliæ, unum Ephipium, et unum frænum &c. [naming the goods], ad valenc' centum solidorum—monetæ Angliæ—præd. A. B. in consid. inde eodem dec^o die Sept., anno lmo supradicto, apud &c. prædict., *super se assumpsit*, et eidem E. adtunc et ibm. fidelit. *promisit*, quod ipse, &c. cum inde requisitus esset &c.,—tamen prom^a. et assump^a. suas præd^a minime curans, &c., nondum solvit, &c., licet, &c., requisitus, &c., sed ille ei solvere hucusque recusavit et adhuc recusat, ad dampnum ipsius E. £20 : et inde producit sectam, &c. &c. &c.”

* Neither Barristers nor Physicians can recover their fees, except under a special contract for them, *Veitch v. Russell*, 3 Q. B. 928 ; nor are they, on the other hand, liable to an action for negligence or unskilfulness

used, and when the other? inquires the student. The general answer to such a question is—that when the object sought to be recovered, is merely *the payment of money* which has become due in respect of a *past, completed, or executed* consideration, arising at the express or implied request of the defendant, then the common counts will suffice. If, for instance, *I have supplied* to the defendant a quantity of oysters, at his request, he becomes liable to pay me for them :—if, in like manner, *I have performed* any kind of labour, or service for him, at his request, he becomes liable to pay me a reasonable compensation : if *I have lent* him money, he becomes liable to repay me : and if I should be unable to prove an express promise to pay me in the first and second cases, or to repay me in the last, the law will imply one, from the defendant's having had the oysters, work, and money :—and all I need state in my declaration is, *generally*, the goods supplied, the work done for the defendant, at his request, or money lent to him ; and that “ in consideration thereof he promised to pay me—so much.” Formerly all this must have been declared upon specially ; and Lord Holt is stated to have said, that he was a bold man who first ventured on these brief and general counts. They have, however, for a very long series of years been established ; and it is difficult to imagine any plausible ground of objection to them. Before quitting them, we must warn the student that, simple as is the *structure* of these “ *indebitatus* counts,” as they are termed, their proper *application* to the facts of a case is frequently a matter of the most critical discretion, as we shall, in a future chapter, explain.

But when—continues the student—must the declaration be special? It is not easy to give a sufficiently brief and comprehensive answer to this question : but it may be laid

down generally, that when the contract is not founded on a past and executed consideration, but on one future and executory; and the promise is not to pay or repay money, or the *value* of goods and chattels, but to do something else—and when the action is founded upon *mutual promises*—*i. e.* the promise of the plaintiff being the consideration for that of the defendant—there the declaration ought to be special. By declaring specially, in contradistinction from declaring generally, is meant—setting out all facts necessary to explain the intention of the parties, and the nature of the transaction; the precise consideration, and promise; the plaintiff's performance of all that he was bound to perform, and the defendant's non-performance, or "*breach*," of contract; and the *damages* sustained by the plaintiff. The practical test usually and safely resorted to on these occasions, is—"Will an action of *Debt* lie?" If it will, then, with very few exceptions, the plaintiff may also declare generally in *assumpsit*. "All the old cases," says Buller, J., in *Walker v. Witter*, 1 Doug. 6, "show, that whenever *indebitatus assumpsit* is maintainable, debt is." The declaration must be special in, for instance, the following cases:—In actions on negotiable instruments, *viz.*, *BILLS OF EXCHANGE*, and *PROMISSORY NOTES*. Till the year 1830, these declarations were exceedingly prolix and intricate; but by the new Rules promulgated in Trinity Term, 1 Hil. 4, and subsequently, short forms are prescribed, and only one count allowed in respect of one instrument. Generally speaking, except when the plaintiff sues, or the defendant is sued, in a representative capacity, *e. g.*, as executor, administrator, assignee, &c., there is comparatively little difficulty in drawing the declaration; but it is far otherwise in the case of *pleas*, which are often very special and difficult, in consequence of

the alteration in the system of pleading introduced by the new Rules, and which require all matters in confession and avoidance to be set forth specially on the record. This, as may be easily believed, requires the pleader's possession of a sound and extensive knowledge, not only of the rules of pleading, but of the intricate nature and incidents of negotiable instruments.—The next great class of cases requiring special declarations, is that of Sea Policies of Insurance, Life Policies, and Charter-parties, when they are not under seal. So in the case of wagers, especially when used by way of feigned issue, by order of the court, or a judge, to try important questions of right; contracts of marriage; to pay money for all sorts of legal services and works; in respect of the sale, use, and exchange of real or personal property; on guarantees, loans, and exchanges; by and against agents and factors; attornies, surgeons and apothecaries; carriers and farriers; and in short, against all persons who have been guilty of negligent, unskilful, and improper conduct in the course of their employment by the plaintiff. To illustrate the structure of these special declarations in assumpsit, two forms will be given in the Appendix,—one for a Breach of Promise of Marriage; the other, Money won at Cribbage. The student will find in them five features essential to every special declaration in assumpsit, however long and intricate—viz. the CONSIDERATION—the PROMISE, or CONTRACT—the AVERMENTS (*i. e.*, when necessary, of performance of a condition precedent,* by the plaintiff, or notice to, or request by, the defendant,)—the BREACH—the DAMAGES. In addition to these, the declaration must open with an INDUCEMENT,

* The question as to what constitutes such a condition precedent is one often of great nicety and difficulty. The rules to discover them are very scientifically laid down in 1 Williams' Saunders' Rep. 320 b, c, d, e; ii. 352, d, e (n.), 8, (sixth ed.)

or introduction of explanatory matter, when necessary. In order to show, also, the formal distinctions between the general counts in Debt, and Assumpsit, specimens of each in the Appendix, follow the special counts. So much for the nature of contracts, and the actions founded upon them; and brief and imperfect as is the foregoing delineation, it ought to enable any student of moderate ability, to form a pretty accurate notion, in most cases, which of the three forms of action he ought to adopt; and whether his declaration ought to be general or special; but we will again remind him, that the due application of the former, and the proper construction of the latter, are matters which will require the study and experience of years.

Another form of action, *ex contractu*,—that of Account,—is one which, at present, is of comparatively rare occurrence, and on which we have bestowed sufficient notice in the preceding chapter.* For an account of the action, the student is referred to Selwyn's *Nisi Prius*, vol. i. pp. 1—6; and for the declaration and pleadings, see 3 Chitt. Pleading, 1204—6 (6th ed.)

Another old action, *ex contractu*, is that of ANNUITY, but it has long been utterly obsolete.

Some writers also class the proceeding by *SCIRE FACIAS* among actions *ex contractu*; and it has undoubtedly pretensions to occupy that position. It is a statutory† substitute for the tedious process of enforcing a recognisance or a judgment, by means of an action of Debt, after the lapse of a year and a day; within which period the plaintiff might have put the judgment in force, *instantly*, by issuing execution. After that period, however, the presumption of law was, that the judgment, not having been so followed

* *Ante*, p. 329.

† 13 Edw. I. (*West. Sec.*) c. 45.

up, had been satisfied by the defendant. The writ of *scire facias* simply calls on the defendant to plead in bar of execution—"quod *scire facias* pifat. T. (the defendant) quod sit coram &c. ostensurus si quid pro se habeat aut dicere sciat, quare &c." The defendant may *plead* to the *scire facias*—and whenever that is the case, the writ is, in law, *an action*,*—and the language of the plea is a prayer of judgment, 'if the plaintiff ought to maintain *his action*.'† The plaintiff *declares*, and the defendant *pleads*, to the declaration—but his plea must not consist of anything which he might have pleaded to the original action.‡ The consequence of this is, that proceedings in *scire facias* soon come to a close. But a writ of *scire facias* is used for other important purposes besides that of reversing a judgment in the way above suggested: when, for instance, any new person is to be affected—either to be charged, or benefited, by a *judgment* already obtained—he must be made a party to it by means of this writ; and then may issue, or become liable to, execution, accordingly. Another extensive application of it is, to repeal letters patent—but into these matters we cannot enter; and must proceed to,

II. ACTIONS EX DELICTO: or, actions for wrongs unconnected with CONTRACT. Of these there are four: appropriated respectively to the cases of torts to, or in respect of, the person, and personal and real property: viz., TRESPASS; CASE; TROVER; and REPLEVIN.

I. TRESPASS lies for injuries accompanied with immediate violence to the person, or to personal, or real property. Thus, if I strike a person, or imprison him; or take from him, or injure, his personal property, or enter

* 2 Will. Saund. 6 (a), note 1 (sixth ed). † *Id. ib.*

‡ Baylis v. Hayward, 4 A. & E. 256.

upon, or commit any immediate injury to, real property corporeal in his possession:—for all these acts, he may maintain an action of **TRESPASS** against me, and recover damages for the injury. In all these cases, the criterion is, the presence of **FORCE**, or **VIOLENCE**. “A trespass is, an *injury committed with violence, actual, or implied*: for the law will imply violence, though none was actually used, when the injury is of a direct and immediate kind, and committed against the person, or tangible and corporeal property of the plaintiff, which is in his possession.”* Of this implied *violence*, may be seen an instance in the case of a peaceable, but wrongful injury on the plaintiff’s land; for “the land of every owner or occupier is enclosed and set apart from that of his neighbour, by either a visible and tangible fence,—as a hedge, railing, or wall, or by an ideal invisible boundary existing only in contemplation of law: as when the land of one person adjoins that of another, in the same open or common field. Hence every unwarrantable entry on the land of another, is called a trespass by *breaking his close*.”† The gist of the action of trespass,—be it observed,—is, *the injury to the possession*—whence it is usually called a **POSSESSORY ACTION**, and cannot be maintained, unless, at the moment of the injury, the plaintiff was in actual or constructive,‡ *immediate and exclusive possession*. It matters not, *as against a wrong-doer*, that the plaintiff had no *right* to be in possession; nor that some third person, not the wrong-doer, was jointly possessed with the plaintiff. Nor it does not signify, in point of law, how slight and unintentional

* Steph. on Plead. 17.

† 3 Bla. Comm. 209, 210.

‡ e. g. by his servants, family, &c. &c.

was the trespass committed by the defendant; but what *damages*, or costs, the plaintiff might recover for bringing an action under such circumstances, is quite another thing. Unless it were brought, *bond fide*, to try a right, the defendant would, in a trivial case, pay a farthing or some merely nominal sum, at once into Court, leaving the plaintiff to proceed for more at the peril of having to pay all the defendant's costs from that moment: and if without the defendant's paying *any* money into Court, the plaintiff should recover less than 40s., he would have to bear all his own costs! *—The above rules seem at first sight sufficiently plain and straightforward: exceedingly difficult questions, nevertheless, continually arise out of the application of them, in practice, but into which we cannot here enter. It is when the question comes to be between *trespass* and *case*, as applicable to a particular state of facts, that difficulties have continually started up, too great to be mastered by almost any amount of learning and ingenuity. Let us come, then, to,

II. CASE, or "TRESPASS ON THE CASE;" which, as we may recollect, is brought to recover damages for injuries bearing a certain *analogy* to trespasses. The first class of cases, then, in which this action may be adopted is in respect of *consequential*, as contradistinguished from *direct*, injuries. About eighty years ago, there occurred the following curious case, as reported in Mr. Justice Blackstone's Reports, vol. ii., p. 892 (*Scott v. Shepherd*). It was an action for a serious injury done by one lad to another, under the following somewhat singular circumstances:—

On the evening of the fair-day at Melbourne Port,

* Stat. 3 & 4 Vict. c. 24, s. 2.

28th October, 1770, the defendant Shepherd threw a *lighted squib*, made of gunpowder, &c., from the street into the market-house, which is a covered building, supported by arches, and enclosed at one end, but open at the other, and at both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. One Willis, instantly, to prevent injury to himself and the wares of Yates, took up the lighted squib from off the standing, and threw it *across* the market-house, when it fell upon another standing, belonging to one Ryal, who sold the same sort of wares as Yates. Ryal instantly, and to save his own goods from being injured, took up the lighted squib from off his standing, and threw it to another part of the market-house, and, in so throwing it, struck with it the plaintiff Scott, then in the said market-house, in the face, and the combustible matter then bursting, put out one of the plaintiff's eyes.—The plaintiff having brought an action of TRESPASS, the question was, whether the proper form of action ought not to have been CASE? Chief Justice De Grey commenced his judgment by observing, that the case was one “in which the line drawn by the law between an action on the case, and of trespass, was very nice and delicate;” and he thus tersely stated the nature of the question: “Whether the injury sustained by the plaintiff, arose from the force of the original act of the defendant, or from a new force by a third person?” Lord Ellenborough, C. J., some thirty years afterwards, viz. in 1813, in another celebrated case of similar difficulty (*Leam v. Bray*, 3 East, 593), approved of this as the true criterion; and it having been decided by the majority of the Court (in the Squib case), that Trespass

was maintainable (Mr. Justice Blackstone dissenting), Lord Ellenborough observed, that "that case, to be sure, went to the limit of the law." However difficult may be the application of this rule, it would seem that the true criterion is—"Was the injurious act the immediate result of the force originally applied by the defendant?" If so, Trespass lies; but the plaintiff is not BOUND to sue in this form of action: for it has been recently decided after great consideration, that Case may be maintained, as well as Trespass, for wrongs committed with direct violence, provided they were not *wilfully* or *designedly*, but only carelessly or negligently, done. (See *Williams v. Holland*, 10 Bing. 113; and also *Wells v. Oddy*, 5 Dow, P. C. 95; Mr. Smith's Notes to the case of *Scott v. Shepherd*, 1 Leading Cases, pp. 217 *et seq.* (1st edit.); 1 Selwyn's Nisi Prius, tit. "Consequential Damages." The case of *Williams v. Holland* thus relieves the practitioner from the distracting difficulties which gave rise to *Scott v. Shepherd*, and *Leam v. Bray*; for wherever there is the least doubt, and the plaintiff cannot show that the act complained of was done *wilfully and designedly*, he will take the prudent course, and sue in Case,—in which form of action he may recover as great an amount of damages, as in Trespass. It is chiefly cases of accidents occurring in driving carriages, and navigating ships, which give rise to these questions: and the results of the numerous decisions on the subject may be thus stated. First, if the injury be both wilful and immediate, Trespass is the only remedy. Secondly, if immediate, yet not wilful, either Trespass or Case may be maintained. Thirdly, when the injury is not immediate, but only *consequential*, Case alone will lie. Fourthly, when the act arises from the negligence of the defendant's *ser-*

vants, Case is the only proper remedy. In this last class of cases, extraordinary difficulties frequently arise, as to the party liable for the acts of servants and drivers. In *Laugher v. Pointer*, 5 Barn. and Cress. 547, for instance, the question was this :—In the year 1826, the owner of a *carriage* hired of a stable-keeper a pair of horses, to draw it for a day ; and the owner of the horses provided a driver, by whose negligent driving the horse of a third party was injured. The question was—whether the owner of the *carriage* was liable for this injury ? Four most able judges were equally divided on the point. Lord Tenterden and Littledale, J., held that he was not ; Bayley and Holroyd, Js., that he was. “ Their judgments,” says Mr. Justice Story,* “ exhaust the whole learning of the subject, and should on that account be attentively studied.” The question of liability in such a case as the foregoing remained unsettled, down to the year 1840 ; when the Court of Exchequer, in *Quarman v. Bennett*, 6 M. and W. 499, after great consideration, confirmed the opinion of Lord Tenterden and Mr. Justice Littledale. Similar questions have arisen in the late cases of *Milligan v. Wedge*, 12 Ad. and Ell. 737 ; *Martin v. Temperley*, 4 Q. B., p.298, and *M’Laughlin v. Pryor*, 4 Mann. and Gr.48 : all of which are commended to the deliberate perusal of the student.

An action “ ON THE CASE” lies, as already intimated, for injuries occasioned by either non-feazance, or mis-feazance, or mal-feazance, in a vast number of cases to which we cannot do more than allude. I. *For torts to the person* ; as by keeping mischievous animals ; for public nuisances occasioning personal injury to the plaintiff ; for malicious prosecutions of different kinds ;

* Commentaries on the law of Agency, p. 406.

for libel and slander ; for criminal conversation with the plaintiff's wife ; for seducing a daughter [in these last two cases trespass also lies*] ; for enticing away apprentices ; for carelessly driving coaches, carriages, &c., so as to injure or wound the plaintiff. II. For torts to *personal property*. For a breach of duty, whether implied by law, or arising out of an implied contract between the parties : *e. g.* against carriers by land, or water, for delaying, or losing articles ; against innkeepers for refusing to lodge the plaintiff, and for losing his goods ; against attorneys, surgeons, apothecaries, &c. &c. &c. for negligence and unskilfulness ; against persons intrusted with property, for injuring it, and not re-delivering it ; for deceit and fraudulent misrepresentation of any kind, occasioning injury to the plaintiff ; for negligent driving, and navigating ships, so as to injure the plaintiff's carriage, or vessel ; for illegal, excessive, and irregular Distresses ; against sheriffs for making false returns to writs, or neglecting to execute them with promptness and diligence ; for infringing copyrights and patents ; and for injury to personal property in reversion—*e. g.* goods in the possession of the plaintiff's tenant, for a term of years. III. For torts to *real property CORPOREAL*. For injury to houses, &c. in *possession*,—by obstructing windows—erecting nuisances near them, &c. ; for injury to houses, &c., in *reversion* ; for waste ; for not cultivating according to the course of good husbandry, or custom of the country ; for injuries to water courses, by diversion, and otherwise. For torts to *real property INCORPOREAL* ; *e. g.* for disturbance of rights of common ;

* This is on the ground that the law regards the wife and daughter as incapable of *consenting* ; and treats such cases as injuries committed with *implied force*.

for obstructing rights of way ; disturbance of ferries—pews—markets—tolls—offices—franchises. From the above enumeration of the instances in which an action *on the case* can be maintained, will be seen its extensive and flexible character, in adapting itself to a vast variety of wrongs. Through all of the actions of Trespass and Case, runs the distinction already alluded to—viz., the presence or absence of *force* ; and in a large class of them, the question to be decided is, whether the *act itself* which has been done, or only the *consequence* of it, is treated as the cause of action. This is decisively indicated by the first line in each of the Declarations in Trespass, and Case. That in Trespass thus commences :—" The plaintiff complains FOR THAT the defendant assaulted him." The introduction of the word " WHEREAS " immediately after the words " for that," would vitiate it as a declaration in trespass ; and, as it were, deflect it into an action on the *case*, in which the *consequences* only of the assault were made the subject of complaint. The student must, with this view, carefully consider the specimens of these declarations given in the Appendix, which amply illustrate the nature of this important distinction. Again : the idea of *force* is totally inapplicable to the cases of an injury committed against *rights of an incorporeal nature*—as in the case of injuries to a person's health, reputation, and real property incorporeal. Again : whether the act complained of was one of omission only, not of commission ; and whether done by the defendant himself, or some one for whose acts he is legally liable—afford decisive indication of the category to which they should be assigned. Another observation to be borne in mind is, that in many of the cases above enumerated, *case* lies concurrently with *assumpsit*. This, as stated in a

former page, is in the case of the breach of IMPLIED contracts, and of the *duty* resulting from them—as in the employment of carriers, innkeepers, persons intrusted with goods for specified purposes—agents of all kinds, attorneys, apothecaries, &c. &c. When persons acting in these and similar capacities are guilty of carelessness, negligence, or unskilfulness, they are liable to an action on the case, or of assumpsit, at the option of the plaintiff, for the injurious consequences arising from such misconduct. Nay, even in the case of an EXPRESS contract, still, if a *common law duty* result from the facts, the party may be sued in tort, for any neglect or misfeasance in the execution of the contract; and this may be, for several important reasons, the preferable mode of proceeding.* In these cases care must be taken not to charge any *undertaking* or *promise*; † but above all, to allege properly the “DUTY” which the defendant is charged with having neglected. First of all comes what is called the *inducement*, *i. e.*, a recital of the facts from which the alleged duty is then deduced in the following terms: “and THEREUPON IT

* The distinction is thus given by that eminent pleading authority, the late Mr. Justice Littledale, in the case of *Burnett v. Lynch*, 5 B. & C. 609. “Where there is an express promise, and a legal obligation results from it, there the plaintiff’s cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case, founded in tort, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action, in which the real cause of action is most accurately described, is the best adapted to every case.”

† See *Corbett v. Packington*, 6 B. & C. 268.

THEN BECAME AND WAS THE DUTY *of the defendant* to ——" do *so and so*. If this be an erroneous deduction, the consequences are fatal. More actions of this kind have been defeated, on account of this defect, than can well be imagined. A very recent and instructive instance is that of *Boorman v. Brown*, 3 Q. B. 511, in which the Court of Queen's Bench arrested the judgment because of an alleged error of this description—its decision, however, being reversed by a Court of Error, who held, that the duty had been properly alleged. The case affords also an interesting exposition of the principles on which *Case* may be sustained for the breach of an express contract. With this important practical caution, we take our leave of the great *genus* of Actions on the Case ; and come to—

III. TROVER, which, itself, equally with *assumpsit*,* originally a *species* of the genus of actions on the Case, has grown, like *Assumpsit*, into a sort of *genus* of itself. Wherever, consequently, these two forms of action are used, though the former may be described in the writ either as "an action on the Case," or as "an action of Trover," the latter is never indicated by its generic name, but by the phrase of "an action *on promises*." When the words "an action on the Case" are used, it generally means 'case' *proper*, as it may be called, exclusively of *Assumpsit*, but inclusive of all the other subjects of an action on the Case.

Trover is brought to recover *damages* for the wrongful conversion of goods and chattels : and by means of it is tried a disputed question of PROPERTY in such goods and chattels. We have seen that trespass can be maintained for

* *Vide ante*, p. 451, 482.

an unlawful *taking* of goods : but Trover can be maintained, not only when goods have been unlawfully taken, but when they are unlawfully *detained*, or have been made away with. This is on the ground that the owner may, if he please, waive the tort of the *taking*, and treat the case as one of unlawful *detention* only ; in which case he can recover the full value of the goods at the time of the original taking of them. It is essential to the right of recovery in this action, that the plaintiff should establish his *right to the IMMEDIATE possession of the goods*. This is a point often of very great difficulty, but we cannot consistently with our limits explain its nature. There is an important distinction between the character of the ownership of real, and of that of personal property, viz., that the right of property in goods “draws to it the possession,” as the phrase is ; whereas, to maintain trespass to real property, there must be actual, or constructive *possession*. On this principle, either Trespass or Trover may be maintained by executors and administrators for goods seized and converted after the owner’s death, and before the grant of probate or administration. See the late case of *Tharpe v. Stallwood*, 5 Mann. & Gr. 761, one displaying much interesting research and learning. Not only may the person who has the absolute property in goods—*i. e.* the absolute owner—maintain Trover, but he who has only a temporary and special property in them. Thus, a mere carrier of goods may sue in Trover for them ; and as against a wrongdoer, the *mere possession* of goods, will entitle the plaintiff to sue in Trover for them : as is shown by the curious case of *Armorie v. Delamirie*, 1 Strange 505. There a chimney-sweeper’s boy found a jewel, which he took to a jeweller, who refused to return it. It was held that although the lad was the mere *finder* of the jewel, he could

maintain Trover for it.* This action derives its name from the fiction on which it is based, viz., that the defendant *found* the goods.† All that must be proved is, the plaintiff's right to the goods, the value of them, and the defendant's conversion of them. This is an action of universal application to cases of disputed right to personal property; and an accurate knowledge of the numerous and difficult rules by which it is regulated—that is, in the great majority of cases, a knowledge of mercantile law—is indispensable, in order to determine whether the action be sustainable. The Declaration is very brief, some dozen lines being sufficient, independently of the enumeration of the goods.

IV. REPLEVIN. This action, like that of Trover, has for its object the recovery of damages for the wrongful conversion of personal property. It has, however, this peculiarity, that it is not *commenced* in any of the superior courts at Westminster, but is removed into them by the power which they have of withdrawing such actions from inferior courts, and transferring them to their own jurisdiction. It is therefore not affected by the provisions of the Uniformity of Process Act (stat. 2 & 3 Will. IV. c. 39). The MIRROR (c. 2, § 6), ascribes the introduction of this action to

* The finder of goods acquires a special property in them, available against all the world, except the true owner; but is bound, before appropriating them to his own use, to take all the means in his power to discover the owner. If the property had not been *designedly abandoned*, and the finder knew who the owner was, or with due exertion could have discovered him, the former is held guilty of larceny, if he keep and appropriate the articles to his own use. See the case in the text; and the recent interesting decision of the Court of Exchequer in *Merry v. Green*, 7 Mee. & W. 623.

† See the form in the Appendix.

Glanvil, the Chief Justice to King Henry II. ; * and for a very long period, it was conceived to be applicable to the case of *wrongful distress* for rent only. This, however, is by no means the case : as the action may in some cases be maintained for a distress for *poor's rates*; see *Selby v. Bardour*, 3 B. & Adol. 2 ; *Sabourin v. Marshall*, *id.* p. 440 ; for rates given to commissioners (*Attorney General v. Brown*, 1 Swanst. 301), and probably (on the authority of Lord Redesdale),† for sewers' and other rates. See cases collected 1 Chitt. Gen. Prac. p. 954, Index *ad vocem*. It is said by Mr. Chitty, that this is an immediate summary remedy in all cases where there has been a wrongful taking by force, except in the single instance of goods taken in execution : and that even goods illegally *detained* may be replevied : ‡ and he regards it as, *the best specific remedy at law*, for the immediate return and securing of any movable chattel,§ contrasting it, in that respect, with Detinue and Trover. In the case of *distress*, the party distrained may have his goods *replevied* [whence the name], *i. e.*, *re-delivered* to him, by giving good security, by bond, to the sheriff, to try the question concerning the legality or illegality of the distress, with the party distraining ; and in the event of the right being determined in favour of the distrainer, to return him the goods.|| This action is undoubtedly generally confined, in practice, to distress for rent : but in the case of *Dore v. Spurrey*, 2 Stark. 288, which was an action of Trover for partnership books, Lord Ellenborough said, that that form of action was not the most convenient for

* 3 Bla. Comm. 146. † *Shannon v. Shannon*, 1 Schoales & Lefr. 327.

‡ 1 Chitt. Gen. Pr. 811.

§ *Id.* p. 812.

|| Stephen on Pleading, pp. 19, 20.

the purpose : and “ that he had heard Mr. Wallace [a very learned lawyer] express his surprise that the remedy by Replevin was not more frequently resorted to, by means of which the party might obtain possession of *the specific chattel of which he had been deprived*, instead of Trover, in which he could recover damages only.” If the plaintiff succeed in this action, he recovers damages for the illegal seizure and detention of his goods : if the defendant prevail, he obtains a return of the goods, or the value of them, or the amount of rent in arrear, with damages and costs. The peculiarity in this action, and one which gives, when distinctly understood, a clue to the real nature of the quaintly inverted order of proceeding, is, that both parties are considered to be, in a measure, plaintiffs—the one, because he claims damages ; the other, a return of the goods. The young practitioner will be saved much embarrassment by early mastering the principle and details of this anomalous action, together with its numerous statutory incidents : and for full information on the subject, he is referred to the last edition of Selwyn’s *Nisi Prius*, *tit.* “ Replevin.”

Thus much for ACTIONS—the bulk, but by no means the whole, of the business transacted in the Courts of Common Law. If we liken the law to a great building, we shall see it divided into distinct compartments, approached by different avenues and entrances, some moderately, some little, and others very greatly frequented. Before the doors over which are written “ Dower,” and “ Quare Impedit,” it may be said that the grass is growing : all is dull and silent ; the hinges, the knockers, and bell-pulls, are rusty and difficult to move. Not much otherwise is it with Detinue : but what a contrast is afforded by REPLEVIN and EJECT-

MENT—by TRESPASS, CASE, TROVER, ASSUMPSIT, DEBT, and COVENANT! All these are thronged from morning till night, like the doors of some great public office—all activity, all regularity, and dispatch! And though the first and second of them have still some little inconveniences in their approaches, the remainder are as readily accessible as can be desired, by the one simple and uniform process of a Writ of Summons. When you have, by its means, entered, accompanied by your opponent, into the interior, then commences the important business of Special Pleading, of which we have already obtained one or two glimpses, but which will be explained at length in a future Chapter.

We have before spoken of the summary jurisdiction of the Common Law Courts; and of the highly important proceedings by INFORMATION, MANDAMUS, PROHIBITION, and QUO WARRANTO, which we described as being of a *quasi*-criminal character.* For that reason we shall postpone the fuller account of them, which ought to be given, to the Chapter devoted to the Criminal Law. We have also indicated the leading subjects of the purely civil summary jurisdiction, whether connected with or independent of† an action: such as Interpleader, and setting aside various instruments by virtue of statutory powers.‡ We shall now very briefly explain the mode in which this jurisdiction is exercised, in order to set either the court, or a judge, judicially in motion. Authentic information must be afforded them of the facts rendering necessary such interference. This is done by means of AFFIDAVITS, which must correctly state the circumstances relied upon; and when counsel applies to the court for this purpose, he is said to “move the court, upon affidavit.”

* *Ante*, p. 287, 316 *et seq.*

† *Id. ib.*

‡ *Ante*, p. 315.

If successful, the court grants him a **RULE**, calling upon the party named in it, to "**SHOW CAUSE**" to the court why the thing specified in the rule should not be done. If no such cause be shown, the rule is then made **ABSOLUTE**, and must be obeyed, on peril of an attachment for contempt of court. If cause be shown, either with or without opposing affidavits, then the matter is fully discussed in open court, and the court either *discharges* the rule partially, or altogether; or makes it, in like manner, wholly or partially *absolute*. If the application involve matter requiring further examination, the court will either order it to be tried before a jury, on an issue directed for that purpose; or refer the whole matter to be inquired into by one of the masters of the court, who will ultimately report his opinion to the court, which usually acts upon such report. This moving for, and showing cause against, rules, constitutes a very large portion of the business of counsel during term time—except when they are engaged, on certain fixed days, in arguing points of law, chiefly on Demurrers, Special Cases, and so forth; and the greatest imaginable care should be exercised by counsel, *to state the contents of affidavits*, i. e., *of important statements solemnly made upon oath—with rigorous fidelity*. If he should be suspected, even, by the bench, of carelessness in these matters—or should be once detected in intentionally misleading the court—his influence with that court is gone for ever. If he misrepresent, or keep back facts, in moving the rules, which ought, in candour, then to have been brought under the notice of the Court,—when the matter comes to be sifted and exposed, on the discussion of the rule, not only will it be discharged, and with costs, but probably a grave and stinging censure inflicted upon the counsel guilty

of such disingenuousness and malpractice. Again: the young counsel should guard against acquiring a despicable and pettifogging habit of taking petty technical objections, and unfair advantages. He should be uniformly candid, straightforward, and liberal; if he be not, he degrades himself and, as far as he can, his profession. In order, however, to make him foil adepts in pettifogging sharp practice,—who often wish to shut out the merits by urging objections *strictissimi juris*—let the young counsel early acquaint himself with the smallest *minutiae* of the details of practice, by thoroughly mastering the *Regulae Generales*—by which the practice of the courts have been recently conducted—the requisite portion of the text-books of practice, and the decisions on which they are founded. Let him, for instance, devote particular attention to the formal parts of affidavits—the *entitling* of them—the descriptions of the deponents *—and the *jurats*—the mode of drawing up the rule founded on the affidavits, &c. &c. &c. How many vexatious defeats of justice does not every week, in term time, witness, from inattention to these apparently petty and unimportant details!

Such being the method of procedure by *motion* and *rule* in term time, we must mention that, having seen how much business can now be transacted during vacation, it is generally effected by means of *SUMMONS* and *ORDER*, which are, in the case of a single judge, what Motion and Rule are to the full court: and the foregoing observations

* See *Regina v. Reeve*, 4 Q. B. 211, in which a most oppressive and cruel procedure was entirely defeated by a technical objection taken to the chief affidavit, on the ground that the deponent had styled himself, *simplifier*, “articled clerk,” without saying to whom; or what was the profession, trade, or calling of the principal.

concerning the latter, are equally applicable to the former. A party 'summons' another to appear before a judge, to show cause why he should not do a particular thing; and that other party then appears before the judge at chambers—which may be done either in term time or vacation—and the matter is discussed before him by counsel, in difficult cases, or by attorneys. This chamber business is a very arduous part of the duties of the Common Law judges. When the public cease to see them presiding in open court, or at Nisi Prius, possibly they imagine that these learned persons are recreating themselves from the fatigue of their public duties. Quite the contrary; they are sitting for many hours together in their rooms at Rolls' Gardens, near the bottom of Chancery Lane, amidst an eager throng of barristers, pleaders, attorneys,* and attorneys' clerks; whose fierce wranglings are often a very severe trial of the patience of a man already,—it may be—exhausted by five or six hours' sitting in court, during, or after term time. In this manner, moreover, is spent the greater part of every day during the circuits, by the judge whose happy lot it is "to remain in town." When to these we add the heavy duties devolving on them at their own houses, in reading their 'papers'—often very voluminous, and preparing their judgments—their labours at the Privy Council, the Old Bailey, and elsewhere in town—and the very severe and exhausting labours of circuit, when for two *months* together they sit from nine o'clock in the morning till five, six, seven, and sometimes ten o'clock at night, having quitted the court, during that long period, only for some five

* Out of courtesy to the Bar, the judges permit counsel, and also pleaders, in arguing, to sit at the same table with them: it is the etiquette for the attorneys to address them standing.

minutes' time to take a hasty lunch in an adjoining room :—when all these things are borne in mind, it will easily be believed that the office of a Common Law judge of modern times, is one of the most laborious that can well be imagined. It was once otherwise ; and we may imagine one of our present judges enjoying the following pleasant picture of *auld lang syne*, with a very lively consciousness of the contrast between the situation of the judges of 1445 and of 1845 ! Thus speaks Fortescue, the Chancellor of Henry VI.*

“ You are to know, further, that the *Judges of England* do not sit in the King's Courts above three hours in the day, that is from eight in the morning till eleven. The courts are not open in the afternoon. The suitors of the court betake themselves to the *Pervise*,† and other places, to advise with the *SERGEANTS-AT-LAW*, and other their counsel about their affairs. The *Judges*, when they have taken their refreshments, spend the rest of the day in the study of the laws, reading of the Holy Scriptures, and innocent amusements at their pleasure. It seems rather a life of contemplation than of much action. Their time is spent in this manner, free from care and worldly avocations.”

Having thus sketched the Common Law judicial province, let us now bestow a few words upon that of the advocate.

* Fortescue, *De Laud.* Chap. li.

† This, says Mr. Selden, means an afternoon's *exercise*, or *resort*, for the instruction, in the law, of *young* (*parvos*) students ; being the same name with the *Parvisie* in Oxford, as they call their sittings general in the schools, in the afternoon. To this ancient custom Chaucer thus alludes in his “ *Serjeant* :”

“ A serjeant at law, ware and wise,
That often had been at the *Pervise*.”

A pleading barrister in full or even fair practice, leads a very anxious and harassing life. To him are entrusted the responsible duty of drawing critical pleadings, and advising on important cases, each requiring much deliberation: but he has also to repair, in term time, to Westminster by ten o'clock A.M., where he is engaged in one or other of the courts, or in momentary expectation of some case of his being called on probably in each of the courts, which he cannot quit till nearly five o'clock. On reaching his chambers, he finds his pleadings and cases in such arrear, as to require his presence there, after a hasty dinner, till ten, twelve, and often two o'clock in the morning: yet must he be at Westminster, or Guildhall, either in, or after, term, by ten or half-past nine, or often by half-past eight o'clock, for early consultations, and prepared for the various exigencies of the day. He may be summoned off to attend the House of Lords, the Privy Council, several Parliamentary Committees, or Judges' Chambers or elsewhere, at a moment's notice; with the prospect of several consultations and arbitrations to attend in the evening, in addition to his heavy chamber business. Then comes circuit twice a-year, viz. about the middle of February and July in each year; and if he be here also in full practice, his energies are severely tried. His precious respite is the Long Vacation, viz. from the close of the circuits, about the beginning of September, till about the end of October; during which interval he may, and generally does, recruit his exhausted faculties, physical and intellectual, by foreign travel,* or sojourn in any

* It is quite exhilarating to contemplate the joyousness of this temporary emancipation, as depicted in the recently-published "Vacation Rambles and Thoughts" of an eminent, amiable, and most successful member

place, at home, which admits of his utter obliviousness of Inns of Court, Westminster, Guildhall, or the circuit.

We have, in the preceding paragraph, merely alluded to one or two other tribunals than those of the ordinary common law courts, before which the common law counsel is called to appear and plead. *Firstly.* The House of Lords. This august tribunal sits only during the session of Parliament; and being the ultimate court of appeal for the whole kingdom, both in civil—principally in equity cases—and criminal matters, is one which requires a very extensive grasp of knowledge in those who are entrusted with the conduct of divorce cases, writs of error, and appeals. At the bar of the House of Lords appear indifferently members of the English, the Scotch, and the Irish bars; and in the first case, without distinction between common law and equity counsel. Much judgment and experience are required in drawing the “cases” on which the hearing proceeds: a duty devolving on the junior counsel. When, too, it is recollected that the most difficult and intricate questions arising out of *Scotch* law, which is altogether different from that of Ireland or England, are often entrusted to English common lawyers, associated with members of the Scotch bar, it is obvious how dangerous will be the consequence of non-acquaintance with the law of Scotland.

Secondly. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. This is a tribunal which may be said to have been

of our profession, Mr. Serjeant Talfourd. This gentleman is a brilliant instance of the compatibility of distinguished excellence in literature and in law.

[“Vacation Rambles and Thoughts, comprised in the Recollections of Three Continental Tours, in the Vacations of 1841, 1842, and 1843. By T. N. Talfourd, D.C.L., and Serjeant at Law.”]

created, or at all events established in its present form, in the years 1832, 1833, and 1844, by statutes 2 & 3 Will. IV., c. 92; 3 & 4 Will. IV., c. 41; and 6 & 7 Vict., c. 38; which erected a permanent Judicial Committee of the Privy Council, for the disposal of appeals, and such other matters as the Queen in Council may refer to them. It possesses and exercises an extraordinary extent of authority, which, together with its capacity duly to exercise such authority, was thus delineated by the Lord Chancellor (Lyndhurst), in the debate which took place in the House of Lords, on the 11th April, 1842:—

“It is admirably adapted for the business it has to perform. There are various kinds of law agitated or discussed, considered, and decided before this tribunal. Questions of civil and ecclesiastical law come before it. There are judges who have been brought up in practising and administering the civil and ecclesiastical laws; and when questions of this kind arise, their attendance is required, and they form part of the court for deciding these questions. Then there are questions of what in England is called Equity. There are judges from the equity courts members of this tribunal; and when questions of that kind are discussed, their attendance is required, and they form part of the court. Again, questions of common law are considered and decided. There are members of that court who are judges of common law; and they attend on these occasions to assist in decision. Nay, more, there are questions of Hindoo and Mahometan law discussed before that tribunal; the result of which is of the utmost importance to the parties. The court has then the assistance of persons who, having practised as judges in India, are familiar with such questions.”

Here, consequently, meet and mingle together, common law counsel, equity counsel, and advocates from Doctors' Commons, before a tranquil and dignified tribunal, consisting rarely of more than five or six members; who exercise the power of a court of appeal, and also of a jury, hearing evidence at their bar, in patent and other cases, exactly as if they constituted, indeed, both a *very* 'special jury,' and the judge directing it.* It is obvious that a court, constituted of such distinguished individuals as that of the House of Lords and Privy Council, requires the possession, in counsel, of courteous manners and address, as well as extensive knowledge and experience.

Thirdly. PARLIAMENTARY COMMITTEES. These are attended principally by the members of the Common Law Bar, and occasionally by those of the Equity Bar, to conduct or oppose Bills for important undertakings, such as Railroads, and for a great number of other purposes; and also in the case of Election petitions. This species of practice is lucrative, but limited to comparatively a few members of the Bar, who make parliamentary business their principal object; it not being consistent with *extensive* practice at either the Common Law or Equity Bar. Before these tribunals are required ready talent in stating cases and arguing them, and also in the examination and cross-examination of witnesses.

Fourthly. THE REVISING BARRISTERS (*ante*, p. 55, *n.*) are taken almost exclusively from among the junior mem-

* In a case not yet reported (*Attorney-General of Jersey v. Ennis*), in which the author was engaged for the plaintiff, who had appealed against a verdict for the defendant, given by the Royal Court at Jersey, in an action of slander, the Privy Council not only set the verdict aside, but ordered it to be entered for the plaintiff *with* 50*l.* damages!

bers of the Common Law Bar, of whom some eighty or ninety are appointed by the Common Law Judges annually; each receiving two hundred guineas for the revision (however long or short may be the period occupied by it), including his travelling and other expenses (stat. 6 & 7 Vict. c. 18, § 59). Any barrister of three years' standing is eligible for these appointments; and when it is considered that their numerous decisions become the subject of appeal to the Court of Common Pleas,* under the late statute just cited (§§ 60 *et seq.*) and that from the passing of that Act up to the present time (June 1845) the Court has confirmed their decisions in nineteen out of twenty cases—such a circumstance cannot but be regarded as one equally honourable to the Bar, and demonstrative of the prudence exercised by the judges in their appointments of barristers. The merit of these functionaries, and also the necessity of candidates for such appointments early qualifying themselves to discharge them satisfactorily, will be appreciated by any one who reflects that some of the nicest questions connected with the tenure of real property, *e. g.* in the case of trustees, assignees, mortgagees, executors, landlords and tenants—the construction and effect of the various instruments creating these relations—and also with the law of evidence, come, with little or no previous notice, or time for preparation, before the Revising Barrister—and that too in public, amidst the bustle and hubbub incident to the proceedings, and the keen scrutiny of the contending parties.

Fifthly. The leading members of the Common Law Bar, as contradistinguished from the professed attendants in

* By § 61 Barristers have an equal right with Serjeants to be heard in these appeals.

the criminal courts, are generally retained to conduct the most important *criminal* cases in the country, whether on special retainers, on circuit, or in the Central Criminal Court, or when they have been removed by *certiorari* * into the Court of Queen's Bench. They also attend in the various courts of Equity, Bankruptcy, and on commissions *de lunatico inquirendo*, and for other purposes, and on writs of inquiry to assess damages, and to award compensation to the owners of property, under a great variety of circumstances.

Thus have we sketched off the various scenes of labour and responsibility occupied by the active and aspiring common lawyer; and without any taint of exaggeration, may we not ask if he do not require for these incessant and multifarious exertions, superior mental and physical qualifications,—equal industry, patience, and energy? With what department of legal knowledge—civil, criminal, or ecclesiastical—can he afford to be unacquainted? And how dangerous his deficiency of general knowledge! How, in short, can he answer the sudden, pressing, and simultaneous calls upon his energies, but by readiness and accuracy in availing himself of previously-acquired resources?

In reviewing our labours, in the foregoing pages of this chapter, there are a few topics to which, though a little out of place, we shall here advert, before parting with the civil branch of the Common Law department of our profession.

I. The distinction between LAW AND FACT, upon which depends so much of our Common Law system, has been already briefly adverted to, and will receive further illustration in the chapter appropriated to the subject of Special Pleading. Dr. Paley has observed, that “ *urging too far the distinction between law and fact, is one to be deprecated, as*

* See this term explained, *post*, in the chapter on Criminal Law.

among the capital infringements upon the great charter of public rights, trial by jury.”* This may be useful as a general caution in applying the rule in question; but Dr. Paley, not being a lawyer, cannot be expected to be as sensible of the real nature and operation of the rule for separating the law from the fact, and the necessity of upholding it on every occasion, as those who are practically conversant with the administration of the law. No pains or vigilance can be too great, which are expended upon the preservation of this rule, intact. In the language of Lord Hardwicke,† “it is of the greatest consequence to the law of England, and also to the subject, that the powers of the judge and jury be kept distinct: that the judge determine the law, and the jury the fact: and if ever they come to be confounded, it will prove the confusion and destruction of the Law of England.” The grand object of pleading, is to secure the separation of law from fact. We have seen that enlightened philosopher and jurist, Sir James Mackintosh,‡ applauding the logical art with which this object is accomplished; and we have already intimated, that the important alterations recently effected in the system, have had a direct and most beneficial tendency in the same way. In some cases there is little difficulty in defining the two provinces. The construction, for instance, of acts of Parliament, and of all written instruments which possess any artificial or legal force or authority, and do not operate simply as mere *evidence tending to the proof* of a fact, undoubtedly belongs to the court: §

* Mor & Pol. Phil. Book vi. c. 8.

† R. v. Poole, Cas-temp. Hardw. 28.

‡ *Ante*, p. 401.

§ See an excellent article in the *Law Review*, vol. i. p. 41. When words which have acquired any particular signification among merchants, are used in mercantile instruments, a judge will ask a jury to find what that signification is, and will then himself *construe* the instrument in which it occurs.

but there are many cases in which law is so intimately blended with fact, that it is almost impossible, sometimes quite impossible, to sever them: in all such cases, the mixed question must needs be left to the jury. Now, our immediate object is, to call the attention of the student, early in his career, to this cardinal distinction, and invite his close examination of the practical machinery by which our law has contrived to effect the separation of law and fact. We allude, first, to the structure of the pleadings, of which more hereafter; but secondly, and chiefly, to the progress of a cause *from the point of issue in fact, joined*—that is, of trial by jury, at Nisi Prius, and the mode of preparing for it. We have already slightly alluded to the appointment of justices in eyre, and of assize: and it is impossible to form the slightest notion of the scope and drift of the most ordinary Nisi Prius record of the present day, simplified and abbreviated though it has recently been, without distinctly understanding the earliest steps taken, in ancient times, to bring home the administration of civil justice to every man's door, by means of the judges of Westminster Hall being sent into the whole length and breadth of the land. This part of the subject, viz., the jury process, and also the method of proceeding at the trial, in order to withdraw the law from the jury, and secure first their due decision of the *facts*, and afterwards the due decision of the law, viz., by demurrer to evidence, by special verdict, by a verdict subject to a special case, and by bill of exceptions, will be found excellently explained, in accordance with the existing state of practice, in Smith's Elementary View of an Action at Law, pp. 90, *et seq.* See also Blackstone's Commentaries, Book iii, c. 23; and 1 Starkie's Evidence, pp. 510, *et seq.* (3d ed.), for an admirable exposition of the prin-

ciples on which the separation of law and fact, is based. In a word, the student can never hope to comprehend the true scope and drift of the doctrines of either PLEADING or EVIDENCE, without early obtaining a correct knowledge of the distinction between law and fact, and the grounds on which it rests.

II. The CONSTRUCTION, EXPOSITION, or INTERPRETATION of the statutes of the realm, is vested in the Courts of Common Law, and governed by its principles.* It is not to be presumed that the legislature intended to make any innovation upon the Common Law, further than the case absolutely required. The law rather infers that the Act did *not* intend to make any alteration, *other* than what is specified, and *besides* what has been plainly pronounced: for if the Parliament had had that design, it is naturally said, that they would have expressed it.† In HEYDON'S CASE, 3 Rep. 7, the Court laid down the following Resolutions, which the student may commit to memory, for they are worthy of it.

“For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the Common Law, four things are to be discussed and considered:—

“I. What was the Common Law before the making of the Act?

“II. What was the mischief and defect against which the Common Law did not provide?

“III. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?

* Per Lord North, in *Carter v. Crawley*, T. Raym. 497; and Lord Ellenborough, C. J., in *Gould v. Capper*, 5 East. 370.

† 2 Darr. Stat. 695

“ IV. The true reason of the remedy.

“ It was then held to be the duty of the judges, at all times, to make such construction as should suppress the mischief, and advance the remedy : putting down all subtle inventions and evasions for the continuance of the mischief, if *pro privato commodo*, and adding force and life to the cure and remedy, *according to the true intent* of the makers of the Act, *pro bono publico*.”

How closely judges have, in modern times, adhered to, or widely separated from, these sound principles, it is not for us to say : but we content ourselves with referring to a previous page,* where some observations will be found relating to the difficulty of ascertaining the boundaries between judicial interpretation, and legislative authority. Parliament has in late years resolved to become, to some extent, its own interpreter ; and seldom passes an act of any importance, without a clause—often a very long one—laying down rules for the interpretation of doubtful words and clauses ; to which, also, it often affixes a positive signification and definition. The judges still speak of construing some statutes “ strictly,”—others “ liberally,”—and so forth. Without presuming to say whether they are wrong in so doing, it may be questioned whether it be not their simple duty to put that plain construction upon the plain words of the legislature, without reference to its objects, which may carry into effect the intention of the framers of the statute. “ I have often lamented,” said Lord Tenterden,† “ that in so many instances the courts have departed from the plain and literal construction of statutes. * * As far as the *authorities* go, I have

* *Ante*, p. 415 *et seq.*

† *R. v. Turvey*, 2 B. & Ald. 522.

always held, and shall always hold, myself bound : but where *they* are silent, I shall hold myself bound to construe Acts of Parliament according to the plain and popular meaning of their words."

The rules laid down for the construction of Acts of Parliament, will be found well collected in Chitty's Burn's Justice, tit. "Statutes" VI.; in Comyn's Digest, tit. "Parliament (R. [R. 10 a.—R. 28.])"; Viner's Abridgement, tit. "Statutes (E. 6.);" Bacon's Abridgement, tit. "Statutes;" and Dwarries' Statutes, ch. xii.

III. The Courts of Common Law entertain a salutary jealousy on the subject of interference with their jurisdiction. "Nothing," said Lord Mansfield, "but EXPRESS NEGATIVE WORDS [in a statute] shall take away the jurisdiction of the Courts of Common Law."* This is a very important rule; has been acted upon in a great number of cases; and is thoroughly established. When the Courts of Requests Acts, for instance, deprive a plaintiff of his costs, if he choose to sue in the superior courts, he may yet sue there (subject to the loss of costs), unless the statute contain an express negative clause, prohibiting him from suing in a superior court. There are very few of the Acts creating inferior courts (commonly called Courts of Conscience, or of Request), which contain these prohibitory clauses. The majority leave the plaintiff at liberty to resort to the superior courts, if he choose to waive his right to recover costs, in the event of his being successful, from his opponent. Nor if a statute gives a party a particular remedy, does it *thereby* impliedly deprive him of his Common Law remedy, if he choose to adopt it: but the one is *cumulative* upon the other. Nor will the Courts

* The King v. Abbot, 2 Doug. 555 (n).

of either Law or Equity allow themselves to be ousted of their jurisdiction, by any agreement of the parties to refer a disputed matter to arbitration. A Court of Equity will not enforce performance of such an agreement, nor a Court of Law allow it to be pleaded in bar of an action.* Courts of Justice are presumed to be better capable of administering and enforcing the real rights of the parties, than any mere private arbitrators, as well from their superior knowledge, as their superior means of sifting the controversy to the very bottom.†

IV. We have seen Mr. Hallam bearing just testimony to the beneficial effects attending the institution of the circuits of the judges, viz. rendering certain and *uniform* the whole body of the Common Law. Twice a year do the Bench and the Bar carry into every quarter of the country, the principles and practice of that law which at Westminster they are mutually concerned in daily discussing and establishing; so that the humblest suitor in Westmoreland, or at the Land's End, knows that his rights are determined on principles governing the rights of all his fellow-subjects, and by the sworn administrators of the law, at Westminster, assisted by counsel thoroughly versed in the principles of that law, by daily argument and research, in the superior courts before those same judges. It was the manifold and grievous evils attending the numerous local courts formerly existing in this country, which led to their abandonment. "They

* *Street v. Rigby*, 6 Ves. 815—8; *Thompson v. Charnock*, 8 T. R. 139. Such an agreement, however, becomes binding, when it has been acted on and an award made. Per Lord Abinger, C.B., in *Cleworth v. Pickford*, 7 M. & W. 321.

† *Id. ib* and 1 Stor. Eq. Jur. 547.

bred," says the illustrious Hale,* "great inconveniences : uncertainty, and variety in the law, through the ignorance of the judges, who in process of time neglected the study of the English law. These courts also had great variety of law, especially in the several counties. For the decisions or judgments, being made by divers courts, and several independent judges and judicatures, who had no common interest among them, in their several judicatures ; thereby, in process of time, every several county would have had several laws, customs, rules, and forms of proceeding : which is always the effect of several independent judicatures, administered by several judges. For these and many other evils, the writ of *False Judgment* provided only an ineffectual remedy : therefore the king [Henry II.], by advice of his parliament, instituted JUSTICES ITINERANTS." And again, in the same work, Sir Matthew Hale has left on record this, his solemn protest against the re-establishment of these local tribunals. "The greatest danger imaginable is, that it may give a handle to the erecting of *county judicatures*, to the countermining of the kingdom. And I must confess, were this to be the effect of it, I think it were the most pernicious thing imaginable. If men will be giddy and unsteady, and we should suppose Parliament not to be sensible of their own and the public concern, some may suppose that 5*l.* may in time rise to 50*l.*, and so the courts at Westminster be destroyed. He that supposeth this, may suppose things yet more dreadful." The evils of local courts are experienced to a grievous extent in America. "The principle of bringing justice home to every man's door," says the late distinguished traveller, Captain Basil Hall, "and of making the administration

* Hist. Com. Law, pp. 138, *et seq.*, and p. 146.

of it cheap, has had a full experience in America ; and *greater practical curses* were never inflicted on any country ! * * * The Pennsylvanians have done away with nearly all the technicalities of the law ; there are no stamps, no special pleadings, and scarcely any one is so poor that he cannot go to law. The consequence is, a scene of litigation from morning till night ; lawyers of course abound everywhere, as no village containing about 200 or 300 inhabitants, is without one or more of them. No person, be his situation or conduct in life what it may, is free from the never-ending pest of lawsuits. Servants, labourers, every one, in short, flies off, on the first occasion, of difference or misunderstanding, to the neighbouring lawyer, to commence an action. No compromise or accommodation is ever dreamt of ; the law must decide everything. The lawyer's fees are fixed at a low rate ; but the passion for litigating a point, increases with indulgence to such a degree, that these victims of cheap justice, or cheap law, seldom stop while they have a dollar left."

Hear another witness to the same point : *—

" Litigation frequently arises here from the imaginary independence which each man has over others ; to show which, on the least slip, a suit is the certain result. It is bad for the people that law is cheap, as it keeps them constantly in strife with their neighbours, and annihilates that sociality of feeling which so strongly characterises the English."

Though several attempts have been made, in late years, to re-establish in England a system so vicious, they have failed, and are not likely to be renewed ; especially after

the enactments of the recent statutes relating to the law of Debtor and Creditor, and of statute 3 & 4 Will. IV., c. 42, § 17—19, for the trial of issues &c. under 20l. before the sheriffs. We may thus regard the existing system of administering justice throughout the kingdom, personally, by the judges of the superior courts, on the circuits, as not likely to be in any way seriously disturbed. The following practical information concerning these

CIRCUITS OF THE JUDGES,

may be useful and interesting to the reader: but it must be observed, that some alteration in them is contemplated, owing to the alleged inconvenient magnitude of one of them (i.e., the Northern Circuit). A Commission has been appointed by the Crown to enquire into this matter; but the result of their labours has been most unsatisfactory.—In what follows, therefore, the reader is to understand that we speak of the old arrangement of the circuits, as it existed immediately previously to the appointment of the Commission in question, in the spring of 1845.—There are EIGHT circuits, which commence towards the close of February, and early in July, in each year, and last, on the average, about six or seven weeks. Two judges go on each of the eight circuits, with the exception of those of North and South Wales, to each of which one judge is found sufficient. Where there are two judges, they preside simultaneously in the civil and criminal courts—but the judge who takes the civil side in one county, takes the criminal side in the next county; and so alternately throughout the circuit.*

* In presiding in the Criminal Court, the Judge sits robed in scarlet and ermine, and wears a full-bottomed wig; but in the Civil Court, he wears a black silk gown, and a short wig.

There appear, by the Law List of 1844, to be 756 counsel attending the various circuits, in the following proportion :—

The Northern Circuit	.	.	.	221
Home	„	.	.	164
Western	„	.	.	121
Oxford	„	.	.	118
Midland	„	.	.	56
Norfolk	„	.	.	38
S. Wales	„	.	.	22
N. Wales	„	.	.	16
<hr/>				
Total	.	.	.	756

The above list comprises a small number of provincial counsel.—The **NORTHERN** Circuit includes Lancashire, Westmoreland, Cumberland, Northumberland, Durham, and Yorkshire.—The **HOME**, Hertfordshire, Essex, Kent, Sussex, and Surrey.—The **WESTERN**, Hampshire, Wiltshire, Dorsetshire, Devonshire, Cornwall, and Somersetshire.—The **OXFORD**, Berkshire, Oxfordshire, Worcestershire, Staffordshire, Shropshire, Herefordshire, Monmouthshire, and Gloucestershire.—The **MIDLAND**, Northamptonshire, Rutlandshire, Lincolnshire, Nottinghamshire, Derbyshire, Leicestershire, and Warwickshire.—The **NORFOLK**, Buckinghamshire, Bedfordshire, Huntingdonshire, Cambridgeshire, Suffolk, and Norfolk.—The **SOUTH WALES**, Glamorganshire, Pembrokeshire, Cardiganshire, Carmarthenshire, Brecknockshire, Radnorshire, and Cheshire.—The **NORTH WALES**, Montgomeryshire, Merionethshire, Carnarvonshire, Anglesea, Denbighshire, Flintshire, and Cheshire.

The expense of attending these circuits, particularly the distant ones, is very serious ; but since the increased facilities for travelling, that expense has been, of course,

much diminished. The charges for lodgings, however, are often extravagantly high. In each of the leading circuits there is a bar mess—the average cost of which, to each person, is about nine shillings *per diem*. It is not compulsory on the members of the circuit to dine at the mess: no one can dine there unless formally admitted: and whoever is rejected from it, is not recognised as a member of the circuit.—To those who, desirous of doing so, do not succeed in obtaining employment, attendance on circuit is inexpressibly irksome and disheartening: but by patient and watchful observation of the business going on in court, is to be obtained a valuable store of professional knowledge and experience, which may at some future day repay its possessor for all the anxiety, self-denial, attention, and perseverance, bestowed upon its acquisition.

CHAPTER XI.

DEPARTMENTS OF THE PROFESSION—

I. CIVIL DEPARTMENT.

PART III.—CONVEYANCING.

IN this silent but important department of the profession, is to be found a class of men discharging duties of a totally different character from any which we have hitherto considered, or shall yet have to examine. While pleaders, and counsel, whether at the Common Law, Criminal, or Equity Bar, and advocates in the Ecclesiastical Courts, are almost exclusively concerned in conducting *litigation*, in all its stages, whether in court, or out of court,—the Conveyancer is engaged in his tranquil vocation, far removed from the hubbub of wordy war, for the exigencies of which he has probably neither the inclination, nor, possibly, the requisite qualifications. While the former classes of practitioners are called into action "*post litem motam*," the conveyancer's chief functions are being exercised "*ante litem motam*,"—in fashioning the weapons, and originating the occasions, of litigation, by creating those rights and liabilities, in respect of every species of *property*, which, in the course of events, come afterwards to be respectively disputed and enforced. How vast are the interests thus entrusted to his keeping! How much depends upon his learning, skill, and caution! How many millions of persons have had their last moments calmed by their confident reliance upon the

validity of his arrangements for the benefit of their surviving families and friends ! Whose death-bed, indeed, would not be disquieted, and its occupant rendered unfit to pass into the grave, if then agitated by even the suggestion of doubts and fears whether his anxious intentions of benefitting survivors, have been really carried into effect,—or by contemplating the possibility that the savings of a life of labour and privation, are fated to be consumed in litigation, and widows, sons and daughters, relatives and friends, embroiled in implacable animosity, and in the event, reduced even to destitution ! An inadvertent insertion or omission of a word, a single stroke of the pen of a conveyancer, may “let slip the dogs of war” upon the fated family of the deceased, and draw down curses upon his unconscious head, or upon the head of him, from whose incompetency, whether from negligence or ignorance, have sprung such lamentable consequences. Take one single instance which occurs to us. No less celebrated a conveyancer than the late Mr. Butler—*pace tanti viri*—made a blunder, in framing a will, which deprived the party whom he had been most anxiously instructed to benefit—a lady—of an estate worth nearly £ 14,000 a year ! It was the omission of a single word, viz., “Gloucester,” which was attended with these disastrous consequences.* These

* See the case (*Newburgh v. Newburgh*, decided in the House of Lords on the 16th June, 1825), alluded to by Tindal, C. J., in *Millar v. Travers*, 8 Bing. 254—5. It affords, also, a very striking illustration of the operation of a grand rule of law, which excluded all parol evidence offered to prove that the word had been omitted by *mistake*. This rule will be found discussed in all its branches, with reference to wills, in the brief “Examination of the Rules of Law respecting the admission of extrinsic evidence in aid of the interpretation of Wills,” by Vice-Chancellor Wigram—a masterly performance, and a fine specimen of legal logic. .

instances are drawn from the case of *wills*; but it is obvious that the foregoing observations apply with equal force to all the various instruments framed by conveyancers, for effecting arrangements to be carried on during parties' life-time, with reference to the enjoyment and transfer of property, and the innumerable transactions relating to business, and to family arrangements. Let us, however, proceed to look a little more closely into this matter.

By a "CONVEYANCE" is signified, an instrument of voluntary alienation* of property of every kind, and of every species of right or interest connected with it; and "*conveyancing*" has been defined, as the *science* and also the *art* of alienation. "If by an investigation of the laws of property, we elicit and systematize the principles which govern its disposition, we are then compacting a *SCIENCE*, which may be defined as a *systematic statement of the principles of alienation*. To apply these principles to practice, by means of appropriate instruments, or conveyances, constitutes the *ART* of alienation."† This branch of our English jurisprudence, justly observes Mr. Serjeant Stephen, involves considerations of a very complex and subtle kind, and has been elaborated into a highly artificial system, maintaining its own separate body of practitioners and professors, and constituting a science in itself.‡ The perplexing intricacies of the existing system, are the product of a long and varied series of national exigencies, to the general character and course of which, a knowledge of English history will supply the student with a ready clue. The *origin* of alienation must be traced up to the

* 1 Steph. Comm. 466.

† 1 Martin's Conveyancing, by Davidson, p. 2.

‡ 1 Steph. Comm. 466.

very earliest times, and is necessarily coeval with the first acquisition of *property*—a matter of profound obscurity, into which it would be folly here even to attempt to enter. Whether moveables or immoveables constituted the first subject of property;—what constituted the right to acquire and retain *possession** of anything, and by what stages was reached the right of dictating who should be the future owners of property;—when and why *symbolical* possession came to be substituted for *actual* possession—as for instance, the land of Elimelech, many ages after the patriarchal ones, [i. e. B.C. 1812] was conveyed to Boaz by the delivery of a shoe (Ruth iv. 7), and calling the elders of the people to witness the act,—exactly as land, in England, was transferred by delivery of a turf, or a bough, and in Scotland, by that of earth and stone†;—and when such, and similar, ceremonies, gave way to set forms of written conveyances—as Jeremiah [B.C. 590] bought the field of Hanameel, by writing, sealing, and witnesses (Jerem. xxxii., 9-18); and when such became the case with subsequent and existing nations :—all these are questions more interesting to the speculative antiquarian inquirer, than calculated to assist the practical student. Before, however, addressing ourselves to the subject which lies immediately before us, we cannot help referring to a very early period [B.C. 1860] in the authentic history of mankind, viz., during the life-

* “In the first ages,” says Lord Stair, “there was no *property* distinct from *lawful possession*, not only of moveables, but even of parts of the earth; for when possessors removed from those parts, they ceased to be theirs, and became the next possessor’s : and therefore the Scripture calleth them *possession*s, without mention of any other property.”—*Institutions of the Law of Scotland*, Lib. ii., tit. i.

† Dalrymple on Feuds, 237.

time of the patriarch Abraham, in order to obtain a glimpse of the oldest conveyance on record. It is given in Genesis xxiii. 17—20. This singular and venerable relic of antiquity will be found to contain, as Mr. Barrington has observed,* some unnecessary and redundant words, and to particularise the property conveyed about as minutely as the “parcels” of a modern conveyance. The *cave of Machpelah* was thus conveyed from the sons of Heth to Abraham. “*The field of Ephron, which was in Machpelah, which was before Mamre, the field, and the cave which was therein, and all the trees that were in the field, that were in all the borders round about,* were made sure unto Abraham for a possession of a burying place, in the presence of the children of Heth, before all that went in at the gates of his city.” This obvious anxiety to define with precision the subject matter, and the boundaries, of the property which Abraham had purchased, affords significant evidence of the degree of attention with which, even in those primitive times, it was deemed necessary to conduct such transactions.

Let us also pause for a moment to introduce to the student a remarkable and most interesting discovery of an ancient Conveyance, mentioned by Chancellor Kent, in his Commentaries (vol. 4, p. 462, *a.*). It is an Egyptian deed of sale, in the Greek language, bearing date B. C. 106, *i.e.* more than a century before the commencement of the Christian æra. It is under seal, and has annexed to it a certificate of Registry in a public office. It is written on papyrus, and was found deposited, in good preservation, in a tomb in Upper Egypt, by the side of a mummy (probably that of Nechutes the pur-

* Barrington on Statutes, pp. 197-8.

chaser), and contains the sale of a piece of land in the city of Thebes. It has the brevity and simplicity of the Saxon deeds, so much commended by Spelman. It gives the names and titles of the sovereigns in whose time the instrument was executed, viz., Cleopatra, and Ptolemy, her son, surnamed Alexander. It describes with precision the ages, stature, and complexion (by way of identity), of each of the contracting parties; as for instance—"Pamonthes," one of the male grantors, "aged about 45, of middle stature, dark complexion, handsome person, bald, round-faced, and straight-nosed;" and "Semmutthis," one of the female grantors, "aged about 22 years, of middle size, yellow complexion, round-faced, flat-nosed, and of quiet demeanour." It then goes on to state, that the four grantors (two brothers and two sisters) have sold, out of the piece of land belonging to them in the southern part of the Memnoneia, eight thousand cubits of vacant ground, one fourth part of the whole. The bounds are, on the South, by the royal street; on the North and East, by the land of Pamonthes, and Bokon of Hermis, his brother, and the common land of the city; on the West, by the house of Tephis, the son of Chalomn; a canal running through the middle, leading from the river. These are the abuttals on all sides. Nechutes the less, the son of Asos, aged about 40 years, of middle stature, yellow complexion, cheerful countenance, long face, and straight nose, with a scar upon the middle of his forehead, has *bought* the same for one talent of brass money. The vendors being the acting salesmen, and warrantors of the sale. Nechutes the purchaser has accepted the same."

"There seems to be no doubt (says Chancellor Kent) of

the authenticity and age of this very curious instrument, in the minds of the distinguished German, French, and English scholars, and profound antiquaries, who have studied the subject, and of a learned writer in the *American Review* for October, 1840; and it is undoubtedly one of the most instructive, and interesting legal documents, which have been rescued from the ruins of remote antiquity.”*

Our Saxon ancestors appear originally to have conveyed their landed property from one to another, in open folk-moot, by means of signs and symbols, which served to fix the transaction in the memory of the Witan, called together by the “Mot bell” to witness it. These symbols varied with the fancy of the donor—one giving a turf another an arrow, or spear, or staff, &c. In one case, Ulfus, a noble of Northumbria, having entered York Minster, filled his drinking horn with wine, and then, on bended knees, gave away to God and to St. Peter, all his lands and revenues; and quaffing the wine, placed his horn upon the altar in token of the gift.† A remarkable instance of seisin given by symbols, is found in the life of St. Birlanda. “The unkind, delicate, and fastidious maiden refused to consort with her leprous father. Oidelardus revenged himself by disinheriting the undutiful child, and transferred his domains, with all the villeins thereupon, to St. Gertrude, by placing all the symbols of property upon her shrine—a turf, a twig, and a knife—indicating that all his estate was alienated to the monastery.”‡

* 4 Kent. Comm. 462, note (a).

† Seld. Jan. Aug. 54. The horn of Ulfus is still preserved in the Minster, and part of the “*terra Ulfæ*” is at this moment in the possession of the Chapter of the Cathedral. Palg. Hist. Eng. i. p. 151.

‡ Palg. Rise and Pr., Part. II., p. cccxxvii.

It appears impossible to fix the precise date of the introduction of written forms of conveyance among the Anglo-Saxons. The earliest on record is of the time of Ethelbert, King of Kent, in the year 605.* This monarch is stated by Sir Harris Nicholas to be the first who conveyed land by written instruments.† At whatever period it occurred, however, it did not occasion the disuse of symbols, which, on the contrary, have continued even down to the present day. Land conveyed by a written instrument was called "*boc* land," and the instrument itself a "*land boc*." Their conveyances were "as short and simple," says Mr. Turner, "as they might always be made, if the ingenuity of mankind were less directed to evade their legal contracts by critical discussions of their construction;" and that learned antiquarian gives the following summary of their constituent parts.

"The Saxon conveyances consisted principally of these things:

"1st. The grantor's name and title are stated. In the older charters, the description is very simple. It is more full in those of a later period; but the grants of Edgar are generally distinguished from those of other kings by a pompous and inflated commencement.

"2nd. A recital is usually inserted, in many instances preceding the donor's name. Sometimes it states his title, or some circumstances connected with it. Sometimes the recital is on the brevity and uncertainty of life, and on the utility of committing deeds to writing; sometimes of the charitable or friendly feelings which occasioned the

* *Palg. Proofs and Illustrations*, p. ccxviii.; where will be found a copy of the charter.

† *Chronology of History*, p. 358.

grant ; and one recital states that the former land-boc, or conveyance, had been destroyed by fire, and that the owner had applied for new ones.

“ 3rd, The conveying words follow, which are usually, ‘ Do et concedo ; donare decrevimus ; concedimus et donamus ; dabo ; trado : ’ or other terms of equivalent import, either of Latin or Saxon. .

“ 4th. The person’s name then occurs to whom the land is granted. The name is sometimes given without any addition, and sometimes the quality or parentage is simply mentioned ; as, Eadredo, Liaban fili Birgwines ; meo fideli ministro Æthelwezde ; Æthelnotho præfecto meo ; Ealdberhto ministro meo, atque Salethrythe sorori tuæ, &c.

“ 5th. What lawyers call the *consideration* of a deed, is commonly inserted. This is sometimes, ‘ pro intimo caritatis affectu,’ ‘ pro ejus humili obedientia,’ ‘ pro redemptione animæ meæ,’ and such like. Often it is for money paid, or a valuable consideration.

“ 6th. Another circumstance frequently mentioned in the royal grants is, that it was done with the consent of the witena or nobles.

“ 7th. The premises are then mentioned. They are described shortly in the body of the grant, by their measured or estimated quantity of land, and the name of the place where they were situate. Some general words then follow, often very like those annexed to the description of premises in our modern conveyances. The grants show that the land of the country was in a state of cultivated divisions, and was known by its divisional appellations. Sometimes the name given to it is expressed to be that by which it was locally known among the inhabitants

of the district. At others, the name is expressed to be its ancient or well-known denomination. The appellation, however, is usually Saxon; though in some few places it is obviously British.

“When estates were large, they comprehended many pieces of land of various descriptions. With the arable land, meadow, marsh, wood, and fisheries were often intended to be passed. In our times, lest the words expressly used to indicate the land conveyed should not include all the property included in the purchase, words of large and general import are added, without any specific idea that such things are actually attached. Such expressions occur in the Saxon charters. Thus in a grant dated in 679, after the land is mentioned, we have ‘with all things pertaining to it, fields, meadows, marshes, woods, fens, and all fisheries to the same land belonging.’ In the Anglo-Saxon grant of a more recent date, the general words are nearly as numerous as in our own present deeds.

“Besides the first description of the place, and the general words, there are commonly added, at the end of the grant, the particular boundaries of the land. The grants are for the most part in Latin, and the boundaries in Saxon.”* Of the remarkable particularity of these boundaries he gives several very curious specimens.

The alteration produced in the forms of conveyances, in consequence of the Norman conquest, did not immediately follow that event, but rather resulted from those progressive changes which terminated in a general fusion of laws.† Till the time of John, all documents, both

* Turner's History of England, Vol. ii., Appendix iv., ch. iv., p. 568.

† 2 Martin, Conv. ii.

public and private, were either in Latin or in Saxon. From the reign of Edward III. (A. D. 1327) to Henry VI. (A. D. 1422) conveyances were usually in French. In the last-mentioned reign they were often in English, but more frequently in Latin: both of these languages continuing to be used indiscriminately, until the reign of James I., when the Latin, was almost wholly superseded by the English, language. About the reign of Henry III., or Edward I., the forms of conveyancing began to assume a very methodical composition, which has in a great measure continued to the present day.* The Saxon mode of subscribing deeds (originally called *charters*) with crosses (a custom retained to this day among the illiterate), gradually gave way to the Norman practice of affixing seals of wax; and the signing and attestation of instruments were also introduced at a very early period.

It has been said by high authority, that lands, among the Saxons, were freely alienable: but such a statement must be received with much qualification. The alienation of *bock-land* was for a long period prohibited, unless with the consent of the heir; but undoubtedly *folk-land*—i. e. that which was held and conveyed without writing—could be aliened and devised; being in the nature of allodial property.—Perhaps no countries, ancient or modern, can be mentioned, in which it has not been considered expedient to restrain and modify the *jus disponendi*. Among the Jews, Greeks, and Romans, there were checks in favour of the heir, upon the alienation of land: but it was reserved for the feudal policy, observes Chancellor Kent,† to impose restraints upon the enjoyment and circulation

* Spelm. Eng. Wks., p. 236; and 2 Martin, 14.

† 4 Comm. 442.

of landed property, to an extent then unprecedented in the annals of Europe. These restraints were imposed partly from favour to the heir of the tenant, but principally from favour to the lord of the fee: but into this wide and interesting field of observation our limits forbid us to enter. The history of the gradual decline of the feudal restraints in England, upon alienation, from the reign of Henry I., when the earliest innovations were made upon them, down to the final recovery of the full and free exercise of the right of disposition, forms a deeply interesting view of the progress of society. "Though the feudal restrictions upon alienation never followed the emigration of our ancestors across the Atlantic," says Chancellor Kent,* "our sympathies are naturally excited, in a review of the subtle contrivances, the resolute struggles, the undiverted perseverance, and final and complete success, which accompanied the efforts of the English nation, in the early period of their history, to break down the stern policy of feudal despotism, and to regain the use and control of their own property, as being one of the inherent rights of mankind." Here again we must strenuously impress upon the student the absolute necessity of his acquainting himself early with the feudal system; without a correct and ready knowledge of which, he can never obtain even a glimmering of the principles of conveyancing, in either its ancient or modern form. He can never know the nature of any "ESTATE," from the highest to the lowest, which can be held or enjoyed, nor comprehend the scope and meaning of any of the instruments by means of which such estates are acquired or transferred.

It would be beyond our purpose to enter into a detailed

* 4 Comm. 443.

history of the different species of conveyances in England, which will be found lucidly explained in the second volume of Blackstone's Commentaries, and in other elementary works. All that can be done, is to advert briefly to the more prominent of them.—The two great disposing powers of transfer of land, in the primitive ages of our common law, were **FEOFFMENT**, and **GRANT**. The former was appropriated to the transfer of *corporeal* property. The Ancient Charter of Feoffment—*Vetus Charta Feoffamenti**—was a document very concise and perfect in its parts, but not a *necessary* appendage of a feoffment, until the reign of Charles II. (A. D. 1677). The transfer of the land was effected by the actual delivery of possession of it, which was termed *livery* [*i. e.* delivery] of *seisin*, [*i. e.* possession] in the presence of the peers, or neighbouring freeholders : which simple ceremony sufficed to convey the entire inheritance in fee simple. A **GRANT** was a conveyance applied to *incorporeal* hereditaments—such as reversions, rents, and services, which, not being of a tangible nature, and existing only in contemplation of law, could not possibly be conveyed by livery of seisin. Such rights were consequently said to “*lie in grant*,” and not (as corporeal rights did) “*in livery*,” and were conveyed simply by the efficacy of a deed. There was the following essential difference between these two modes of conveyance. While the former (a feoffment,) carried destruction in its course, by operating upon the possession, without any regard to the estate or interest of the feoffor, the latter (a grant) benignly operated upon such estate or interest only, as the grantor himself actually had, and could convey.†

* See it at length in 2 Blac. Comm. App. No. 1.

† Littleton, §§ 608, 609 ; 4 Kent, 490.

—FINES, and RECOVERIES, were also very ancient, singularly artificial, and complicated modes of conveyance. The earliest records of the former (Fines) are found in the year 1182. They were fictitious *actions, commenced only*, and then compromised, by leave of the Court, whereby the lands in question were acknowledged to belong for ever to one of the parties to the pretended action. A RECOVERY (invented towards the close of the 13th century, by the ecclesiastics, to elude the laws of Mortmain) was a fictitious action *carried on through all its stages*; and the object and effect of both these complicated modes of conveyance was, to bar estates tail, and incidentally to pass the estates of married women. These cumbrous fictions—or, in the language of Mr. Williams, “this solemn juggling”—constituted, in actual practice, a branch of conveyancing of the most subtle, intricate, and costly character;* and after being allowed for centuries to deform our jurisprudence, were in the year 1833 abolished in England by Stat. 3 & 4 Will. IV., c. 74, and in Ireland in 1834, by Stat. 4 & 5 Will. IV., cap. 92, which substituted for them “more simple modes of assurance.” This was done on the recommendations of the Real Property Commissioners, but only in accordance with the suggestion found in the Commentaries of Sir William Blackstone.† A deed enrolled in the Court of Chancery has now been substituted, as well for a fine, as for a common recovery; and nothing can be more simple, economical, and effectual, than the machinery which has thus been called into action. The majority of conveyancers are loud in their laudations of this important statute. “There can be no hesitation in affirming,” says

* 1 Steph. Comm. 530.

† 2 Black. Comm. 361.

Mr. Davidson,* "that it is beyond all comparison the most [?] perfect and admirable piece of legislation in respect of the laws of property, which has ever been placed upon our statute-book." There are, however, very high authorities who entertain grave doubts concerning the policy on which it is founded, and anticipate ill consequences from its working. Sir Edward Sugden, the present Lord-Chancellor of Ireland, will be found, in a passage which will be quoted in an ensuing page, expressing such distrust; while another great living authority, a gentleman of immense experience, and almost unparalleled celebrity as a conveyancer, Mr. Preston, will be found in the letter with which this chapter closes, expressing similar apprehensions.

The introduction of *USES* and *TRUSTS* produced a great revolution in the transfer and modification of landed property.† *Uses* were originally, like *Recoveries*, a device resorted to by the astute and indefatigable ecclesiastics, towards the close of the reign of Edward III., for the purpose of evading the statutes of *Mortmain*: and the countenance given to the contrivance, by the ecclesiastical chancellors, brought matters to such a pass, that almost all the lands in the kingdom were conveyed upon this new-fangled principle, "to the utter subversion of the ancient common laws of the kingdom."‡ At length, towards the close of the reign of Henry VIII., the legislature interposed, with the design of annihilating the entire system, and subverting the jurisdiction which by its means the Court of Chancery had obtained over landed estates. The

* 5 Martin's Conv. by Dav., p. 301.

† See Coke upon Litt., 272, a. Mr. Butler's Note.

‡ Stat. 27 Hen. VIII., c 10, preamble.

scheme of the ecclesiastics was this:—To obtain grants of land, to third persons, for the *use* or *benefit* of the religious houses. These transactions, the *clerical* chancellors very naturally upheld and sanctioned, as *fidei commissa*, and binding in conscience; and they compelled the party to hold the land sacredly to the uses thus created. The hint was soon taken by laymen, as admirably applicable to the civil purposes of the private transfer of property; and in working out this new idea, there gradually rose up an entirely novel and most intricate system, attended undoubtedly with divers serious inconveniences, and in entire subversion of the ancient modes of common law conveyance. After a number of legislative interferences, all tending to treat the person for whose *use* or *benefit* the estate was held, as the *real owner* of that estate, in the year 1535 the famous Statute of Uses was passed (27 Hen. VIII. c. 10), designed to cut the Gordian knot; by enacting simply, that whenever one person is actually “*seised*, to the use, confidence, or trust” of another, the *latter* shall thenceforth be deemed to be in the ACTUAL SEISIN OR POSSESSION. For this reason the statute in question is styled, in legal language, the statute “for TRANSFERRING USES INTO POSSESSION;” and it is, as Mr. Williams has justly observed, “a curious instance of the power of an Act of Parliament; in fact, enacting that what is given to A, shall, under certain circumstances, not be given to A at all, but to somebody else.”* This bold enactment, however, totally failed in securing its framers’ main object, viz., prostrating the powers of the Court of Chancery; and, as we intimated in the preceding chapter,† the Court of Chancery contrived to frustrate all that had been done, by artfully converting the refinement of “*a use UPON a*

* Principles of the Law of Real Property, p. 121.

† *Ante*, p. 355.

use" into a *trust*, of which it was the peculiar province of that court to enforce performance. The object of the celebrated Statute of Uses (27 Hen. VIII. c. 10) was to restore the notoriety of the old common law conveyances; but so far from effecting such a result, the existence, and transfer, of fiduciary or trust estates, has continued ever since in full vigour. Secret methods of transferring the possession itself have been discovered, and have totally superseded that open mode of transferring property which was so great a favourite of the common law; and many modifications or limitations of real property have been introduced in consequence of the Statute of Uses, of which the common law did not admit, and was totally unsusceptible. This led also, as explained in the foregoing chapter, to the establishment of the two distinct systems of jurisprudence, viz. of law and equity, which have occupied so much of our attention, in attempting to explain the distinction between "legal" and "equitable" estates. The conveyance by means of which the agency of uses was principally brought to bear upon the disposition of real property, since the Statute of Uses, is called a "**LEASE AND RELEASE**;" which, having been, with different incidents, previously in existence, but rarely used, soon afterwards became, and is now (or was till the late statutes 4 & 5 Vict. c. 21, and 7 & 8 Vict. c. 76) the most common mode of transferring real property in this country, whether by way of Sale, Mortgage, or Settlement. As it avoids the inconvenience and notoriety attending the mode of procedure by feoffment, so it is also exempt from the necessity of enrolment which the statute (27 Hen. VIII., c. 16) requires in a **BARGAIN AND SALE**—another method of conveyance existing previously to the Statute of Uses, and which, after it had passed, was resorted to, in con-

sequence of an oversight of its framers, for the purpose of completing the machinery of the compound conveyance of Lease and Release. In order to avoid the inconvenience of going down to the premises which were the subject of conveyance, and making an *actual entry* upon them, as had been necessary before the Statute of Uses, in order to vest the *possession* in the person intended to become the legal owner, that result has been obtained since, and by virtue of the statute, by means of a bargain and sale, usually for a year (though any period, longer or shorter, would suffice).* The execution of such an instrument operated so as to vest, as it were by a sort of statutory magic, the *possession* of the lands, in the lessee; who, from that moment was capable of receiving, in conformity with the ancient common-law doctrine, a *Release*, which would enlarge his previous temporary and trifling interest, into an estate in fee simple. This Release operated, as has been observed, *by the common law*: and by its instrumentality the entire estate of the owner was easily moulded and parcelled out, so as to answer all the purposes and effect the most arbitrary and complicated intentions, of the parties. This "Lease and Release," though actually two distinct deeds or instruments,—the Lease operating solely by virtue of the Statute of Uses, and the Release by the common law,—constituted only *one conveyance*. To save, however, expence and inconvenience, the legislature has recently† dispensed with the necessity of any Lease, and directed that every such Release as that of which we have been speaking, shall, if it refer to this statute, of itself operate as a conveyance by Lease and Release; and has more recently de-

* 3 Martin's Conv. by Dav., p. 199, note l.

† Stat. 4 & 5 Vict. c. 21.

clared (7 & 8 Vict. c. 76) that all real property may be conveyed by one deed, without any reference or formality, if such deed be *stamped* both as a Lease and a Release. Hence is obvious the absolute necessity of still acquiring a correct knowledge of the former mode of conveyance by Lease and Release.

But the Statute of Uses was not the only important change in the law of real property effected in the reign of Henry VIII. Five years after the passing of that statute, were enacted those of 32 and 34 Henry VIII., permitting the alienation of lands by WILL—a right, however, which received its final consummation in the reign of Charles II., when the feudal tenures were abolished, and the right of devising freehold lands became complete and universal. Here also there has recently been effected a most important improvement, by stat. 7 Will. IV. & 1 Vict. c. 26,* enabling testators, by wills made or republished after the 31st day of December 1837, to dispose of all their real and personal property, and prescribing particular methods of execution and attestation.

From this cursory sketch of the progress of conveyancing, it will be seen that about the reign of Henry VIII. it was placed on an entirely new basis: and hence the propriety of a remark made by Mr. Butler, A. D. 1787, in the preface to his invaluable edition of Coke upon Littleton, concerning the peculiar merit and value of Sir Edward Coke's writings.

“ He is to be considered as the CENTRE OF ANCIENT AND MODERN LAW. The modern system of the law may be supposed to have taken its rise at the end of the reign of King Henry VII., and to have assumed something of a regular form about the latter part of the reign of Charles II.

* This Act does not extend to Scotland ; § 35.

“The principal features of this alteration are, the introduction of recoveries ; conveyances to uses ; the testamentary disposition by wills ; the abolition of military tenures ; the statute of frauds and perjuries ; the establishment of a regular system of equitable jurisdiction ; the discontinuance of real actions ; and the mode of trying titles to landed property by ejectment. There is no doubt that during the above period, a material alteration was effected in the jurisprudence of this country ; but it has been effected not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now Sir Edward Coke’s Commentary upon Littleton is an immense repository of everything that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the year-books, or in the dry though valuable abridgments of Statham, Fitzherbert, Brooke, and Rolle. Every person who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of Sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

“But his writings are not only a depository of ancient learning ; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line ; on the other, he points out the leading circumstances of the innovations

which then began to take place. He shows the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after the free alienation of it was allowed. He shows how the notorious and public transfer of property by livery of seisin was superseded by the secret and refined mode of transferring it, introduced in consequence of the Statute of Uses. We may trace in his works the beginning of the disuse of real actions; the tendency in the nation to convert the military into socage tenures; and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect, the ancient and modern parts of the law; and by showing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another."

This was written towards the close of the last century (A. D. 1787); but within the last twelve years, changes of such magnitude have taken place, (some of which we have glanced at,) as to warrant the statement that we have entered upon a new æra of conveyancing, and arrived at a day when a large portion of the learning regarded in 1787 as "modern," has become comparatively ancient and obsolete. The law of INHERITANCE may be said to have undergone a radical alteration; that of WILLS, PRESCRIPTION, LIMITATION OF ACTIONS AND SUITS, of DOWER, and ALIENATION by married women, has been entirely remodelled; and Real Estates effectually subjected to the payment of debts, whether by specialty or simple contract. Several other most important alterations were effected in 1844 by the statute 7 & 8 Vict.,

c. 76 (already several times referred to), entitled "An Act to simplify the transfer of property;" the principal of which was the abolition of **CONTINGENT REMAINDERS**. This hasty and ill-drawn Act, however, has had to encounter universal disapprobation, and will be either repealed, or entirely remodelled, during the present session (1845); in which many more changes in real property law have just been proposed by Lord Brougham, but with what prospect of being effected, remains to be seen. But what are those above mentioned, and several other important alterations which might be mentioned, when compared with the abolition of Fines and Recoveries, and the substitution of the new modes of Assurance in their stead? It is impossible to over-estimate the magnitude of the change thus effected. Seldom has the science of jurisprudence witnessed so bold, masterly, and successful an experiment,—for successful it has hitherto been,—although grave fears have been expressed, as we have seen, concerning its miscarriage, by even the ablest lawyers, and most eminent authorities.

"I should suppose," says Chancellor Kent,* speaking shortly after the proposal of the Real Property Commissioners to abolish Fines and Recoveries, "that there must be great veneration justly due to a system of transfer by Record [*i. e.* by Fines and Recoveries, which were called '*Assurances of Record*,'] which has exhausted so much cultivation, which has been transmitted down, in constant activity, from distant ages, and on whose foundations the best part of English Real Property reposes. In Sergeant Wilson's Essay on Fines they are said to be '*the strength of every man's inheritance.*' Such a great

* 4 Comm. 498.

innovation may have an unpropitious influence upon the character, policy, and stability of the English jurisprudence. It will, however, favourably abridge the labour of students, and make great havoc in an English law library. Volume after volume, filled with essays and adjudications upon Fines and Recoveries, will be consigned to oblivion."

Thus also spoke that high authority in Real Property law, Sir Edward Sugden, the present Lord Chancellor of Ireland:—"The sweeping away of Fines and Recoveries is a solid improvement in the law, and the Act of Parliament [by which it was effected] is a masterly performance, and reflects great credit on the learned conveyancer [Mr. Brodie] by whom it was framed. But the policy of the provisions in the Act may be doubted. All men's titles must for many years depend upon the law of Fines and Recoveries, and few [practitioners] will be found, in a short time, competent to judge of their validity. The substitute for the old law is one of vast complication, introducing a *Protector*, in every settlement, to check the alienation by tenant in tail, in remainder.—Whilst we brush away our old books, no one can doubt that the new system, from its complication, will lay the foundation for new ones, and that the construction of the Act in every given case, will not be settled but after a long run of litigation, although no doubt at first everything will proceed smoothly. The author was one of those who thought that the law would have been more simple if it had merely abolished Fines and Recoveries, and made Deeds to declare the uses of Fines, and to make tenants to the *præcipe* in Recoveries, effectual, without actually levying a fine or suffering a recovery."

Sir Edward has retained the above passage in the last

edition of his work, which was published in 1839.* Twelve years have elapsed since the statute came into operation, but its provisions have *hitherto* not been the subject of such litigation as had been thus anticipated. One observation, however, in the foregoing paragraph, it is of the very highest importance that the student should bear in mind; namely, that though a new system has been established, in lieu of the ancient one of Fines and Recoveries, yet a knowledge of them—aye, and a ready and accurate one, too,—is absolutely indispensable for the conveyancer, and indeed for pleaders, and members of the Common Law, and of the Equity Bar. For very many years to come, almost every abstract of title will consist of a series of conveyances under the abolished system; and how can the practitioner do his duty to his client, if he be ignorant of what is thus laid before him? A striking illustration of the truth of this remark, as applicable to Common Law pleaders, is afforded by a set of papers, just submitted to the author; being instructions to draw a Declaration on an ordinary Lease, but granted under a Power, given in a marriage settlement, to the husband, to grant leases. The lessor was the husband of a lady to whom the demised premises, as part of a very large landed estate, had belonged before marriage, and which was settled in strict settlement, for the purposes of which a Recovery had been suffered; and the Deed to lead the Uses was sufficiently special and complicated. It became necessary, however, to set it out accurately, and at length, in the Declaration, and in fact, to deduce a good title, through all the intricate machinery of Uses, Trusts, and Powers which had been brought into play; the plaintiff being the devisee in fee of the lessor, who, after having granted the lease, had

* Vol. ii., p. 311 (10th ed.)

survived his wife—she, on failure of issue, having, pursuant to the power reserved to her, devised the entire property to him, and he ultimately to the plaintiff. Nor is such a case one of infrequent occurrence, as the common-law student will quickly find, on commencing his pupillage. —The conveyancer of the present day must thus, in fact, master two systems of conveyancing—the old one and the new one; and he is, in this respect, much more disadvantageously situated than the common lawyer, with reference to the abolished portion of *his* branch of the law. The latter will, it is true, have considerable difficulty, on referring to cases decided under a state of pleading and practice now abolished, in comprehending the scope and meaning of the decision, if he be ignorant of the technicalities of the law as it was *then* administered; but the instruments, and course, of actual litigation are *new*. With the conveyancer, however, it is otherwise; for almost every instrument brought before him for his opinion as to its precise operation, or requiring to be framed *de novo* by him, consists, to a large extent, of the abolished portion of the most abstruse parts of real property law. He will still have to thread his way through all the intricate tortuosities of Fines and Recoveries, and the previous deeds to *lead*, and subsequent deeds to *declare*, the uses of them—and, in fact, when advising on the sufficiency of an abstract of a title running over the last sixty or even twenty years, he must be as well apprised of what was necessary to confer validity on the various methods of conveyance there detailed, as if they were still in force.

The office of a conveyancer may be divided into two main branches:—to advise on Cases submitted for his opinion, and upon Abstracts of title, with a view to

ascertaining the sufficiency of the title proposed to a purchaser; and to draw the requisite instruments of alienation.—I. An **ABSTRACT OF TITLE** is simply an *epitome of the evidences of ownership*,*—a definition which instantly suggests the difficult and responsible duties, which the consideration of it devolves upon the conveyancer. He must be lynx-eyed on behalf of his client, in detecting any flaw, great or little, and providing against it, if possible; but, if irremediable, advising the abandonment of the contract. What must be his feelings if, on subsequently discovering, that relying on his conveyancer's opinion, that client has lost every farthing of his purchase-money—that his conveyance is all waste paper or parchment? Not only must the conveyancer be familiar with every species of conveyance—its exact scope and operation—but with the *evidence* requisite to establish their validity: for a man may be, beyond all moral doubt, the rightful owner of property, and yet not have the means of showing it. *De non apparentibus, et de non existentibus, eadem est ratio*. This consideration is too often overlooked by young conveyancers; or at all events, does not receive from them that degree of attention which its great importance warrants and requires. An expert conveyancer, well acquainted with the rules of evidence, will relieve the client, whose conveyance he is drawing, from a great number of future embarrassments and difficulties in establishing his rights; while one ignorant of these rules, or imperfectly acquainted with them, will needlessly expose his client to most serious inconvenience and danger. Again: let not the student imagine that the difficulties attending this branch of the conveyancer's duties, are confined to

* 1 Martin's Conv. 2.

transactions of great magnitude. A few days' experience will show him, that the transfer of comparatively very trifling interests, is often exceedingly complicated, and exacts a high degree of legal judgment, experience, and knowledge.* To take frivolous objections to a title, evinces great imbecility, illiberality, and ignorance, does much mischief, and injures the character and reputation of the party so offending.

II. The other branch of a conveyancer's duties, comprises the preparation of all the various instruments adapted for transferring real and personal property, and for effecting and regulating the various relationships and arrangements entered into for family or business purposes. It is superfluous to say that this requires an accurate and comprehensive knowledge of the nature and incidents of all the various kinds and modifications of property, real and personal; of the structure and operation of the various instruments of conveyance; and of the exact legal import of language and of terms of art, as construed by the Courts, in the event of an appeal to them becoming necessary.

A conveyancer's functions may thus be said to have a *retrospective* and *prospective* aspect. The former are concerned in searching into the legal effect and validity of by-gone transactions; the latter, in the comprehensive contemplation of contingencies, and making effectual provision against them. Under the former head fall that

* One of the author's clients is at this moment negotiating a purchase of half a yard of land, the title to which is spread over a period of upwards of sixty years, and occupies a hundred sheets of brief paper. This petty fragment of land will produce its seller 420*l.*; and in order to its due conveyance, the entire title to a manor, of which it forms a part, must be investigated.

portion of the duties which have been above adverted to, namely, advising on abstracts of title, and upon the construction and effect of existing instruments—as to the real nature of the rights and liabilities thereby created; in order to enable clients prudently either to assert, or abstain from asserting, *claims*—and for that purpose resorting to, or declining, legal proceedings. Under the latter head falls the preparation of those instruments which are required to effectuate the intentions of the parties with reference to the future. Here, it is manifest, are required no mean experience, acuteness, and fertility of resources, in order to foresee and provide against, future exigencies. The preparation of WILLS, and family SETTLEMENTS, is an obvious illustration of this remark. How exceedingly great is often the difficulty of carrying into effect, consistently with the rules of law, the multiform caprices in which testators are at liberty to indulge! Take again the cases of MORTGAGES—of all the various kinds of LEASES—of PURCHASE DEEDS (especially the preparation of prudent CONDITIONS OF SALE*)—DISENTAILING DEEDS (under the late Act)—COMPOSITION DEEDS—PARTNERSHIP DEEDS—ANNUITY DEEDS—PRIVATE ACTS OF PARLIAMENT—and many other instruments which could be mentioned. How exact and extensive must be the knowledge requisite, especially in transactions of importance, to enable the conveyancer to confer exactly the *rights*, and impose pre-

* "There is no task," says Mr. Davidson, "which a conveyancer has to execute, of greater responsibility and risk, than that of framing Conditions of Sale. It is necessary to foresee every conceivable objection, and to guard, by special conditions, against all which cannot be removed—and at the same time not to insert a single unnecessary stipulation; because every stipulation beyond those ordinarily used, is calculated to alarm purchasers." —*Martin's Conveyancing*, by Davidson, vol. iii., p. 27.

cisely the *liabilities* desired, so as that when the texture of his handiwork comes hereafter to be tested by LITIGATION, its strength may evidence the sagacity of its framer! Or *will it then give way*, disclosing the weak, unskilful hands which have been employed upon it, and exhibiting gross ignorance of the machinery—for instance—of Uses, Trusts, and Powers—dull, confused perceptions of the objects which had been proposed to the draftsman, or bungling, unworkmanlike modes of attaining them! Here, however, we may glance, in passing, at one advantage possessed by the conveyancer over his brother practitioners in courts of law and equity: that the blunders of the former are often not discovered till long after they can seriously injure their perpetrator; whereas those of the latter are detected almost as soon as committed—the instant that the pleading, or other document in which they occur, is submitted to their opponent's scrutiny! It is true that every draft of a conveyance, of difficulty or importance, is submitted to the examination of the other party's counsel, and all drafts are submitted to the opposite party's solicitor; but in the latter case, many are deemed perfectly simple and straightforward matters, which, in reality, are far otherwise, and require the consideration of the ablest conveyancer. Not however receiving that consideration, for either the reason just suggested, or because of the haste with which the transaction may be unavoidably effected, it is obvious that serious slips may pass unobserved. And in the former case, even, the most grievous oversights and miscarriages of conveyancers often have, for several reasons, a far greater chance of escaping immediate detection, than those of pleaders and counsel at law and in equity.

Let us not, however, in making these observations, be considered as disposed to over-estimate the difficulties of conveyancing. Though superior strength of understanding be requisite to become an eminent conveyancer, considerable reputation and success may be attained by one of moderate intellectual powers, provided the study be entered upon in earnest, and comparatively exclusive attention bestowed upon it. Great assistance is derivable from several excellent collections of PRECEDENTS in conveyancing, the principal of which ought to be diligently perused and considered by the student, at an early period of his career, as affording most instructive illustrations of the practical application of those doctrines and principles to which his attention may have been already successfully directed. This is an observation which applies forcibly to the case of students preparing for the common law bar; who will soon find their account in having acquired a tolerable *familiarity* with the different portions of the principal conveyances, so as to discern at once their operative parts, and distinguish between them, and those of mere form. There is no single instrument framed by the conveyancer, which does not continually become the subject, directly or indirectly, of litigation in the common law courts—requiring to be correctly set forth in the pleadings, and thoroughly understood as to its real operation, in discussion, both in Banco, and at Nisi Prius. As for the young conveyancer himself, his early object should be, to acquire a terse and correct style of drafting. Perspicuity and precision are objects of paramount importance. He must avoid equally excessive particularity and prolixity on the one hand, and an elliptical and suggestive style on the other. Let him, at the same time, bear in mind

an observation of Horne Tooke's, in his "Diversions of Purley," that "legal instruments have always been, and always must be, remarkably more tedious, and prolix* than any other writings in which the same clearness and

* Length and verbosity have been from time immemorial charged upon the conveyancer. One of our legal antiquarians (Somner) in a kind of funeral eulogium on the Saxon simplicity, observed, that even in his time, "*an acre of land could not pass without almost an acre of parchment.*" So, in Donne's second satire—

"In parchment, then, large as the fields, he draws
Assurances."

Shakspeare makes *Hamlet* remark, "that the very conveyances of a man's lands would hardly lie in this box [a coffin]; and must the inheritor himself have no more!"—And again—

Hamlet.—Is not parchment made of sheepskins?

Horatio.—Aye, my lord, and of calf-skins, too.

Hamlet.—They are sheep and calves that seek out assurance in that!"

"Somner might have observed at this day," says Wynne, "that a flock of sheep is often converted into a settlement."—See *Ennomus*, p. 207. The following explanation of the increased length of modern deeds, is given by the Editor of the "Conveyancer's Assistant," published in 1702. "It is true that conveyances in our times may well be called books; I say, in our times, for in our forefather's days, a manor, with a demeane of a thousand pounds per annum, might have been transferred by a parchment writing not much bigger than a bond; yet now twenty or thirty skins of parchment are frequently engrossed towards the conveyance or settlement of an estate of not half the value. *Crescit in orbe dolus*, is given as a good reason by my Lord Coke; and yet this is not all. The statute of Uses first occasioned the spinning out of conveyances; and since trading has increased, letting out of money upon mortgage, first of one part of an estate, and afterwards of another, hath likewise increased, which, by assignments, and keeping them on foot, to an entire purchaser, for protecting from incumbrances, have swelled into a bushel of sheepskins. Besides, men who had ample estates descended from their ancestors, were desirous to keep them in the name and blood, and so invented the preservation of Contingent Uses; and then they considered that though nature and policy obliged them to leave the fairest and most ancient patrimonial estate to their heir-at-law (who might be as a stadtholder of the family), yet when they saw that younger brothers and sisters were but as servants and mere dependents, they began to invent provisions for younger sons and daughters. Hence came Annuities, Portionary Payments, either by grant, or by raising Uses, Trusts, Powers, and the like."

precision, are not equally important. Abbreviations open a door for doubt; and by the use of them, what we gained in time, we lose in precision and certainty." The author would earnestly recommend the conveyancing student to bestow an attentive and repeated perusal, upon Mr. Davidson's brief but instructive disquisition upon the structure of conveyances, and the true use of precedents, contained in the "Introduction" to the third volume of "Martin's Conveyancing, by Davidson." It extends to twenty-five pages only, and bears decisive testimony to the practical ability of its writer. The following is the *first* of the five rules upon which he says that the Draftsman should act.

"Before any draft is commenced, the WHOLE DESIGN of it should be conceived; for if a man proceed without any settled design, it is manifest that his draft will be confused and incoherent; that many things will be done which ought not to be done, and many left undone which ought to be done. He will be puzzled at every step of his progress, in determining what ought to be inserted, and what to be omitted, and will have no clue to guide him in his decision, because he does not know what his own object is. Undoubtedly, as he proceeds, he will generally have to alter, more or less, the details of his plan; but if he be possessed of competent skill, and have sufficiently acquainted himself, before he begins, with the state of facts, it is but seldom that he will be compelled to change his general design: and it may be observed, that a general design, on which a considerable part of a draft has been drawn, should never be changed without urgent reason; because, that part of the draft which has been previously prepared, will, unless revised with the most anxious care,

be inconsistent with the remainder, and will, in spite of every precaution, frequently retain discrepancies, in the reference and otherwise, of the most serious nature. Of course, however, if the original design be found inapplicable, it must be changed, and the mischiefs which have been pointed out, be averted, as far as possible, by a careful revision."

A conveyancer ought to be a man of clear logical head, and habits of exact and patient thought—such as are likely to be acquired by the previous study of mathematics. He ought also to be early familiarised with the best models of *composition*, such as Hume and Paley, in order to acquire the invaluable art of simple, terse, and perspicuous expression. It requires but a moderately trained eye to distinguish between the performances of well and ill-educated draftsmen,—to detect vast differences between the drafts of different conveyancers, referrible entirely to their attention to, or neglect of, the suggestions here offered to the student. Some instruments will be as simple, methodical, and even elegant, as others confused and bungling, and discreditable to their framers, equally as lawyers and men of liberal education. Much will depend, in the great majority of cases, upon the models earliest brought before the student. He should be careful in selecting his tutor—anxious to ascertain not merely whether he be a good lawyer, but a *good draftsman*—i. e. whether he belong to a good school of conveyancing, which discards the unwieldy prolixity, redundancy, and parenthetical perplexity, but too often to be encountered in the labours of inferior conveyancers, and which earn for them the "curses not loud but deep," of all those whose unhappy fate it afterwards becomes, in

the capacity of judges or counsel, to attempt to interpret them, and of the unfortunate clients whose rights are, in consequence, put in such serious jeopardy.

From the immediately foregoing observations, and others offered in the preceding portion of this chapter, the conveyancing student may collect that great will be the advantage derivable from his spending a year, or at all events, six months, in the chambers of both a common law, and an equity pleader or barrister, where he will see the practical operation of the instruments which he has been learning to draw; the mode in which defects in them are made available in litigation; and, above all, acquire a practical insight into the law of EVIDENCE. He will thus also be enabled to see what kinds of instruments, by way of security or otherwise, are capable of being made promptly available by the parties taking them, and what are of an inconvenient and comparatively impracticable character. These and many other advantages may be secured by adopting the course suggested—one which the author has frequently heard commended by the most distinguished conveyancers.

The conveyancing department of the profession will be exactly suitable to a man of timid, retiring, or phlegmatic temperament, averse from, or disqualified for, the stirring and exciting scenes of warfare in the Courts. He must, however, make up his mind to encounter a serious amount of monotonous labour, of downright drudgery, in drafting; such as, to a man of gay and volatile humour, will soon prove perfectly intolerable. A conveyancer is indeed *worthy of his hire*. His emoluments are often grossly inadequate to his deserts—utterly disproportioned to his labour and responsibility. This cannot, in fact, be called a lucrative branch

of business—at all events, as compared with court practice, in Equity ; to which, however, it proves, not unfrequently, an avenue.

Several works have been published within the last few years, for the purpose of affording students an idea of the existing state of Real Property law, and enabling them to appreciate the nature of those vast changes which it has undergone, in consequence of the recommendations of the Real Property Commissioners. Some of these performances are the productions of men of established ability and learning, and worthy of the reputation of their writers ; but the author of the present work has never, till very recently, met with one which appeared to him so complete and comprehensive, and of such a *thoroughly elementary* character, as might have been written, and with confidence recommended, to all classes of students. A few months ago, however, there appeared a little work which came casually under his notice, and which, after careful examination of it, appears to him—and his opinion has been confirmed by very able friends whom he has consulted,—to be decidedly superior to any of its predecessors. It is entitled “Principles of the Law of Real Property, intended as a First Book for Students in Conveyancing, by Joshua Williams, Esq., of Lincoln’s Inn, Barrister-at-Law.” The following is its author’s account of his object in composing the work.

“It is intended to supply what he has long felt to be a *desideratum*—a FIRST BOOK for the use of students in conveyancing, as easy and readable as the nature of the subject will allow. In attempting this object, he has not always followed the old beaten track, but pursued the

more difficult, yet more interesting course of original investigation. He has endeavoured to lead the student rather to work out his knowledge for himself, than to be content to gather fragments at the hands of authority. If he wish to become an adept in the practice of conveyancing, he must first be a master of the science; and if he would master the science, he should first trace out to their sources those great and leading principles which, when well known, give easy access to innumerable minute details. The object of the present work, therefore, is not to cram the student with learning, but rather to quicken his appetite for a kind of knowledge which seldom appears very palatable at first. It does not profess to present him with so ample and varied an entertainment as is afforded by Blackstone in his Commentaries; neither is it, on the other hand, as sparing and frugal as the 'Principles' of Mr. Watkins, nor, it is hoped, so indigestible as the well-packed compendium of Mr. Burton. . . . To give to each principle its adequate importance,—from the crowds of illustrations to present the best,—to write a book readable, yet useful for reference,—to avoid plagiarism, yet abide by authority,—is indeed no easy matter.”*

From this work, extending to 360 pages only, a student of only average intelligence, possessing some idea of the leading principles of the feudal system, may derive, in a very short time, correct and comprehensive notions of Real Property law. It presupposes the possession of little or no preliminary legal knowledge. It begins with the beginning; and in a natural and easy

* Preface, pp. iv., v.

order, and in a popular style, introduces the student to all the great PRINCIPLES on which the system is based; indicates with brevity and distinctness the various stages of its development; and enables him to appreciate the nature of the evils which called for a reform of the system, and to comprehend the precise nature of that reform. In this last particular consists the distinguishing excellence of the plan and execution of the work; for as one goes along, without any violence of transition, or interruption of the method, one is constantly apprised of the injurious working of the former system, and the practical amelioration effected by some of the alterations made even as lately as in the late session (1844). The style, too, is superior to that of most works of its class. It is terse and lucid, with an occasional dash of quaintness, which tends to relieve much of the monotony inseparable from the subject. Thus the author opens his subject—the following being the first paragraph in the work.

“In the early ages of Europe, property was chiefly of a substantial and visible, or, what lawyers call, a corporeal kind. Trade was little practised, and consequently debts were seldom incurred. There were no public funds, and of course no funded property. The public wealth consisted principally of land, and the houses and buildings erected upon it; of the cattle in the fields; and the goods in the houses. Now land, which is immovable and indestructible, is evidently a different species of property from a cow or a sheep, which may be stolen, killed, and eaten; or from a chair or a table, which may be broken up or burnt. No man, be he ever so feloniously disposed, can run away with an acre of land: the owner may be ejected,

but the land remains where it was, and he who has been wrongfully turned out of possession, may be reinstated into the identical portion of land from which he had been removed. Not so with moveable property: the thief may be discovered and punished; but if he have made away with the goods, no power on earth can restore them to their owner. All he can hope to obtain, is a compensation in money, or in some other article of equal value.

“*Moveable* and *immovable*, then, is one of the simplest and most natural divisions of property in times of but partial civilization. In our law, this division has been brought into great prominence by the circumstances of our early history.”

After a glance at the Norman Conquest, and the introduction of the feudal system, the author thus proceeds:

“The system of *tenure* could evidently exist only as to lands and things immovable. Cattle and other moveables were things of too perishable and insignificant a nature to be subject to any feudal liabilities, and could therefore be bestowed as *absolute gifts* only. No duty or service could well be annexed as the condition of their ownership. Hence a superiority became attached to all *immovable* property, and the distinction between it and *moveables* became clearly marked; so that, whilst *lands* were the subject of the disquisitions of lawyers, the decisions of the courts of justice, and the attention of the legislature, *moveable* property passed almost unnoticed.

“Lands, houses, and immovable property—things capable of being held in the way above described—were called *tenements*, or *things held*. They were also denominated *hereditaments*, because on the death of the owner they devolved by law to his heir. So that the phrase, *lands*,

tenements, and hereditaments, was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day.

“The other, or moveable class of property, was known by the name of ‘*goods*’ or ‘*chattels*.’ The derivation of the word *chattel* has not been precisely ascertained. Both it and the word *goods*, are well known to be still in use, as technical terms, amongst lawyers.

“So great was the influence of the feudal system, and so important the tenure, or holding, of lands, whether by the vassals of the crown, or by the vassals of those vassals, that for a long time immovable property was known rather by the name of *tenements*, than by any other term more indicative of its fixed and indestructible nature. In time, however, from various causes, the feudal system began to give way. The growth of a commercial spirit, the rising power of towns, and the formation of an influential middle class, combined to render the relation of lord and vassal anything but a reciprocal advantage; and at the restoration of King Charles II., a final blow was given to the whole system. Its form indeed remained, but its spirit was extinguished. The tenures of land then became less burdensome to the owner, and less troublesome to the law student; and the courts of law, instead of being occupied with disputes between *lords and tenants*, had their attention more directed to controversies between *different owners*. It became then more obvious, that the essential difference between land and goods, was to be found in the **REMEDIES** for the deprivation of either: that land could always be restored, but goods could not;—that, as to the one, the *real* land itself could be recovered; but, as to the

other, proceedings must be had against the *person* who had taken them away. The two great classes of property accordingly began to acquire two other names more characteristic of their difference. The remedies for the recovery of lands, had long been called *real* actions, and the remedies for loss of goods, *personal* actions. But it was not until the feudal system had lost its hold, that land and tenements were called *real property*, and goods and chattels *personal property*.

"It appears then, that lands and tenements were designated, in later times, *real property*, more from the nature of the legal remedy for their recovery, than simply because they were real things; and, on the other hand, goods and chattels were called *personal property* because the remedy for their abstraction was against the person who had taken them away. Personal property has been described as that which may attend the owner's person wherever he thinks fit to go; but goods and chattels were not usually called things personal till they had become too numerous and important to attend the person of their owners.

"The terms "*real property*" and "*personal property*" are now more commonly used than the old terms, *tenements and hereditaments*,—*goods and chattels*. The old terms were, indeed, suited only to the feudal times in which they originated. Since those times, great changes have taken place: commerce has been widely extended, loans of money at interest have become common, and the FUNDS have engulfed an immense mass of wealth. Both classes of property have accordingly been increased by fresh additions; and within the new names of *real* and *personal*, many kinds of property are now included, to which our forefathers were quite strangers, so much so,

that the simple division into immovable tenements, and moveable chattels, is lost in the many exceptions to which time, and altered circumstances, have given rise. Thus shares in canals and railways, which are sufficiently immovable, are generally personal property; funded property is personal; whilst a dignity or title of honour, which one should have thought to be as locomotive as its owner, is not a chattel, but a tenement. Canal and railway shares, and funded property, are made personal by the different Acts of Parliament under the authority of which they have originated: and titles of honour are real property because in ancient times such titles were annexed to the ownership of various lands.

* * * * "There is now perhaps as much personal property in the country as real; possibly there may be more; real property, however, still retains many of its ancient laws, which invest it with an interest and importance to which personal property has no claim. Of these ancient laws, one of the most conspicuous is the feudal rule of descent, under which, as partially modified by the recent Act (3 and 4 William IV., c. 106), real property goes, when its owner dies intestate, to his *heir*; while personal property is distributed, under the same circumstances, amongst the *next of kin* of the intestate, by an administrator appointed for that purpose by the Ecclesiastical Court."

Having thus indicated the nature of the distinction between Real and Personal property, he touches with equal felicity upon that between Corporeal and Incorporeal, and then proceeds to the body of his Treatise; which he thus concludes—the following being the last paragraph of the book, and written in a philosophical spirit.

"From what has been already said, the reader will per-

ceive that the law of England has two different systems of rules, for regulating the enjoyment and transfer of property; that the laws of real estate, though venerable for their antiquity, are in the same degree ill adapted to the requirements of modern society; whilst the laws of personal property, being of more recent origin, are proportionably suited to modern times. Over them both has arisen the jurisdiction of the Court of Chancery, by means of which the ancient strictness and simplicity of our real property laws, have been in a measure rendered subservient to the arrangements and modifications of ownership, which the various necessities of society have required. Added to this have been continual enactments, especially of late years, by which many of the most glaring evils have been remedied, but by which, at the same time, the symmetry of the laws of real property has been greatly impaired. Those laws cannot indeed be now said to form a system; their present state is certainly not that in which they can remain. For the future, perhaps the wisest course to be followed would be to aim as far as possible at a uniformity of system in the laws of both kinds of property; and for this purpose, rather to take the laws of personal estate as the model to which the laws of real estate should be made to conform, than on the one hand to preserve untouched all the ancient rules, because they once were useful, or, on the other, to be annually plucking off, by parliamentary enactments, the fruit which such rules must, until eradicated, necessarily produce.”*

The work is divided into five parts—(1.) **CORPOREAL HEREDITAMENTS**, under which head are contained eleven

* *Principles of the Law of Real Property*, pp. 1, 2, 5, 8, 10, 359, 360.

chapters on the following subjects. (1.) Of an Estate for Life; (2.) Of an Estate Tail; (3.) Of an Estate in Fee Simple; (4.) Of the *Descent* of an Estate in Fee Simple; (5.) Of the *Tenure* of an Estate in Fee Simple; (6.) Of Joint Tenants and Tenants in Common; (7.) Of a Feoffment; (8.) Of Uses and Trusts; (9.) Of a Lease and Release; (10.) Of a Will of Lands; (11.) Of the Mutual Rights of Husband and Wife. These important topics occupy 176 pages—and then we come to—Part II. INCORPOREAL HEREDITAMENTS. Chapter (1.) Of a Reversion, and a Vested Remainder; (2.) Of a Contingent Remainder; (3.) Of an Executory Interest; (§ 1.) Of the *means* by which Executory Interests may be created; (§ 2.) Of the *Time within which* Executory Interests must arise; (4.) Of Hereditaments purely incorporeal. This brings us to page 262, which opens with Part III.—OF COPYHOLDS. (1.) Of Estates of Copyhold; (2.) Of the Alienation of Copyholds. At page 294 commences Part IV. OF PERSONAL INTERESTS IN REAL ESTATE. Chapter (1.) Of Personal Property, and its alienation; (2.) Of a Term of Years; (3.) Of a Mortgage Debt. At page 344 we find Part V., devoted to the subject of TITLE, which concludes the work at page 360.

All these topics are treated in a very satisfactory manner by the writer; whose exposition of the objects proposed by the Real Property Commissioners, and commentaries upon the measures which they have devised for attaining these objects, is concise, lucid, and intelligible to the veriest tyro; and will enable him, with moderate attention, to appreciate the value of becoming early familiar with both the old and new systems of conveyancing. The grand alteration in the law of Descent; the new

modes of barring Estates tail; the systems of Tenures; of Uses and Trusts; of the conveyance by Lease and Release; of the nature of executory interests; and of Personal Interests in Real Estate, will be found here admirably expounded. To the specimen which we have already given, we will add one more—explanatory of the mode in which a tenant in fee simple can alienate his estate.—

“ We have seen that the powers of alienation possessed by a tenant in fee simple, enable him to make a lease for a term of years, or for life, or a gift in tail, as well as to grant an Estate in fee simple. But these powers are not simply in the alternative; for, he may exercise all of them at one and the same moment; provided, of course, that his grantees come in, one at a time, in some prescribed order, the one waiting for liberty to enter, until the Estate of the other shall have been determined. In such a case the ordinary mode of conveyance is alone made use of; and if a feoffment should be employed, there will be no occasion for a *deed* to limit or mark out the estates of those who cannot have immediate possession. The seisin will then be delivered to the first person who is to have possession; and, if such person is to be only a tenant for a term of years, such seisin will immediately vest in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his Estate, the seisin will devolve on the other grantees of freehold estates, in the order in which their estates are limited to come into possession. So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, nor on how many persons the same

estate is bestowed. Thus, a grant may be made at once to fifty different people separately for their lives. In such case the grantee for life, who is first to have the possession, is the particular tenant, to whom, on a feoffment, seisin would be delivered, and all the rest are remainder men ; whilst the reversion in fee simple expectant on the decease of them all, remains with the grantor. The second grantee for life has a remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease, or in case of his forfeiture of the estate, or otherwise. The third grantee must wait till the estate both of the first and second shall have been determined ; and so of the rest. The mode in which such a set of estates would be marked out is as follows : To A for his life, and after his decease to B for his life ; and after his decease to C for his life, and so on. This method of limitation is quite sufficient for the purpose although it by no means expresses all that is meant. The estates of B and C and the rest, are intended to be as immediately and effectually vested in them as the estate of A ; so that if A were to forfeit his estate, B would have an immediate right to the possession ; and so again C would have a right to enter in whenever the estates both of A and B should have determined. But owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every deed. The words, "and after his decease," are therefore considered a sufficient expression of an intention to confer a vested remainder after an estate for life. In the case we have selected of numerous estates, every one given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit ; and should the first grantee survive all the others, and not

forfeit his estate, not one of them will take anything. Nevertheless each one of these grantees has an estate for life, in remainder, immediately *vested* in him; and each of these remainders is capable of being transferred both at law and in equity, by a deed of grant, in the same manner as a reversion. In the same way, a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all, an estate in fee simple to a fourth; and these grantees may be entitled to possession in any prescribed order, except as to the grantee of the estate in fee simple, who must necessarily come last; for, his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees for ever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term of years; or the order may be reversed, and the term of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession, till all the others shall have been determined. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail, as we have already seen. This risk it *must* run. But if any estate, be it ever so small, is always ready from its commencement to its end, to come into possession the moment that the prior estates, be they what they may, happen to have determined,—it is then a *vested remainder*, and recognised in law as an estate grantable by deed. It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent, possession being taken by the remainder-man. The *gift* is immediate; but the *enjoyment* must necessarily depend on the determina-

tion of the estates of those, who have a prior right to the possession." *

It is understood that the writer of the work from which extracts have been taken, is engaged in a similar Treatise on the Law of PERSONAL Property. If its plan be as happily conceived and executed, as that on the Law of REAL Property, the two will constitute standard manuals for the use of students entering all branches, and both ranks, of the profession.—BURTON'S† ELEMENTARY COMPENDIUM OF THE LAW OF REAL PROPERTY, (published in 1828,) is also a work of very great merit, as a scientific condensation of the principles of the Law of Real Property, as it stood, [A. D. 1828] previously to the change effected in consequence of the Reports of the Real Property Commissioners. It is a small octavo volume containing 540 pages; is admirably arranged, and very accurate in its positions, but exceedingly condensed, and, to young readers, "indigestible," as observed by Mr. Williams. There is not to be found in it a superfluous word. It has gone through several editions; but the student is recommended to procure the original edition, whenever it can be met with; for without offering any opinion on the merits of the ensuing editions, which contain very copious annotations explanatory of the recent changes, it is conceived that since it is so necessary for the student to be acquainted with the *former* state of the law, here he will have it in a pure and authentic form.

* Principles of the Law of Real Property, pp. 188—191.

† The author of this masterly performance (Walter Henry Burton, a Vinerian Fellow in the University of Oxford) died shortly after the appearance of the first edition. He had scarcely reached the prime of his life, and fell a victim, it is believed, to the severity of his application. Had he lived, he would have been a great ornament to the profession.

The author ventures to recommend the student to commence his study of the Law of Real Property, by perusing some one of the accounts of the Feudal System mentioned in a previous part of the work (*ante*, pp. 252, *et seq.*) giving the preference principally to that of Blackstone, or Mr. Butler. Then should be read with deep attention, Wright's Tenures; after which Mr. Williams's Principles of the Law of Real Property will constitute an admirable *introduction* to a complete course of reading, consisting, as the student may be advised, of Burton's Compendium; the incomparable second volume of Blackstone's Commentaries; Sanders on Uses and Trusts, (the last edition published in 1844, is ably edited by the son of the very learned author, and Mr. Warner, both experienced conveyancers); Jarman on Wills; Shepherd's Touchstone, by Mr. Preston; Preston's Essay on Estates and Abstracts of Title; Sir Edward Sugden's Treatises on Powers, and on Vendors and Purchasers of Estates, (Sir Edward's style is exceedingly hard and dry, but his writings are celebrated for their soundness and accuracy); Coote, or Powell, on Mortgages; Fearne on Contingent Remainders; Cruise's Digest; Bacon's Abridgement; and Coke upon Littleton. These are some of the principal standard works upon Real Property Law. In reading them, the student will bear in mind a just observation made by Chancellor Kent while recommending the careful study of Blackstone's Commentaries,—that "WHAT IS OBSOLETE IS NECESSARY TO UNDERSTAND THAT WHICH REMAINS IN USE,"* and be very careful how he discards those portions of the works above mentioned, which appear to have been rendered useless by subsequent changes.

* Kent, Comm., p. 512.

As a preceding chapter was concluded with a letter of the late Lord Eldon to an Equity Student, so the present cannot conclude better than with the late Mr. Butler's sketch of the course of reading to be adopted by the student in the Laws of Real Property; and with a letter received by the author of the present work, since he commenced the preparation of this edition, from that celebrated conveyancer, Mr. Preston. Whatever falls from so eminent and venerable an authority, cannot but be both interesting and valuable. The author wrote to Mr. Preston, to ask him his opinion concerning the Act for Simplifying the Transfer of Real Property; and also whether he still retained the views concerning legal education, which he had expressed in an inaugural lecture delivered a few months after the appearance of the former edition of this work, of which he was then pleased to speak in terms which afforded the author lively and lasting gratification.

I.—MR. BUTLER'S OUTLINE OF A COURSE OF READING ON REAL PROPERTY LAW.*

[Written long previous to the recent alterations in that law.]

The student should begin by reading "*Littleton's Tenures*," with extreme attention, meditating on every word, and framing every section into a diagram, abstaining altogether from Coke's Commentaries, but perusing "*Gilbert's Tenures*." After this he should peruse "*Sir Martin Wright's Tenures*," and "*Mr. Watkins' Treatise on Descents*:" and then give Littleton's Tenures a second perusal. After this second perusal of the Tenures, he should peruse it a third time, with the *Commentaries* of Sir Edward Coke, and afterwards peruse *Shepherd's Touch-*

* Butler's Reminiscences, p. 61.

stone, in Mr. Preston's invaluable edition of that work. The student may then peruse, the "Note on FEUDS, on USES, and on TRUSTS in the last edition of Coke upon Littleton; and then read Littleton's and Coke, and the notes of the last editors." [Mr. Hargrave, and Mr. Butler.]

(II.) MR. PRESTON'S LETTER TO THE AUTHOR, CONCERNING SOME RECENT CHANGES IN REAL PROPERTY LAW, AND ON THE COURSE OF A LEGAL EDUCATION.

Lee House, Chulmleigh, Devon, 23rd October, 1844.

MY DEAR SIR,

* * * The Act which abolishes Contingent Remainders, has not yet come under my notice; and till I have read the Act, I will not pretend to judge of its efficacy or utility. On one point, however, I am satisfied,—that it ought not to have been an isolated measure, but a part and a consequence of a reform of system, *i. e. an amalgamation and uniformity of rule in respect of legal and equitable estates*. It is a singular fact, well known to the Benchers of the Inner Temple, that it was lately under consideration that I should, as Reader for this year, have delivered to the rising generation of the Society, a lecture, for which I was most amply prepared, on a plan to amalgamate the operation of the law as applicable to Legal and Equitable Estates: and one of my propositions, or enactments, would have been, that in respect of Contingent Remainders, Gifts of Legal and Equitable Interests should have been placed on the same footing. But to arrive at this result, by principle and science, my care would have been to correct the system, by declaring that no Tenant for Life, or in Tail, should have the right, or power, to make a

wrongful or tortious alienation, or to surrender or merge a particular estate, to the prejudice of the Contingent Remainder. Through this great and leading point, the Science of Tenures, as applicable to legal Estates, would, by a short and simple form of enactment prepared by me, and reduced into system long before the existence of Lord Campbell's Law Commission,—have been assimilated to, and identified with, the state of title under equitable ownership ; and, except for the purposes of ejectment,—and even that point might have been reformed —(as Lord Mansfield aimed, though contrary to existing principles, to reform it,) it would thus have been rendered wholly indifferent, whether the beneficial Owner had a legal, or only a Trust, and beneficial, or equitable ownership. The system properly carried out, must cancel many of the protective rules of a Court of Equity, viz.—the protection to purchasers having the prior legal title, without *notice*.

Experience, and the opinion of Ch. J. Gibbs, and my knowledge of the profession by reason of my having come into contact with a large (it may be truly said the great influential) body of the Members of the Bench and the Bar during the period of more than fifty years, have satisfied my mind, that Sir Vicary Gibbs was correct, in a degree, though not wholly, when he stated to me, that he never knew a good lawyer who had not learned the law through Co. Litt, or a good classic, who had not been initiated through the Eton Grammar ; and he showed me his MS. criticisms on Littleton during his course of study, which were very judicious. In my Inaugural Address in King's College, as the elected Professor of Law, the opinion which I expressed on your valuable work on the Study of the Law, was honest and true. With Sir Vicary Gibbs for my aid

and support, and with my immense opportunities of judging of the legal qualifications of the Members of the Bench and Bar with whom I had come into contact, I then thought, and still think, that a Legal Education should, for the purposes of science, and for the honour and success of the pupil, be founded on a course of study adopting the following order or gradation :—

1st Course. GENERAL PRINCIPLES, as embodied in the *Capitula*, and the more obvious and leading propositions of Wingate's Book of Maxims.

(1.) Finch's Maxims, in his work, ' Finch's *Ley*, or Common Law,' and another work, being an enlargement of the first work, *i. e.* Finch's Description of the Common Law.

(2.) Branch's Maxims, or Sentences, to be committed to memory.

2d Course. The General Rules of Evidence, and the Rules which govern the Construction of Deeds, and Wills, and Acts of Parliament.

3rd Course. The General Rules of Tenure, and a complete knowledge of the Quantities and Qualities of Estates, and the Incidents and Accidents attached to them.

4th Course. The essential difference between Legal and Equitable Ownership.

5th Course. An outline of the protection which a Court of Equity affords to a Purchaser with Honesty and Integrity, who can obtain the *Tabula in Naufragio*.

With this preparatory knowledge, and without the science of the professed conveyancer, the pleader, and consequently the practitioner in Courts of Law or Equity, and even in criminal courts, will have the first and elementary principles to which, in all cases of difficulty, he must resort; and without those aids, he is in a

troubled ocean without a compass. Good Pleading, and the evidence in support of it, must be founded on this primary and essential knowledge of principle. Heir, or not heir, depends on the Rules of *Descent*. *Feoffavit,—Dedit,—Demisit,—Tenet,—vel non*, and *liberum tenementum*, depend on this science. So does every question of *meum vel tuum* in respect of personal chattels, the right to cut timber, to work mines, &c. &c. &c. In short the pleader, without this fundamental knowledge, is in the same, or the like condition, as a mariner without a chart.

The Enactment for the Abolition of Fines and Recoveries never met with my approbation. It is not sufficiently simple, nor, as far as I can judge, always intelligible. It departs from *principle*, in giving, in some cases, to the owner of a Chattel Interest, the rights of a freeholder; and in other instances to the owner of an equitable freehold, the rights proper to a freeholder of the legal estate: and for a long series of years the property lawyer must, in forming his opinion on any abstract of title under his consideration, keep the Law of Fines and Recoveries for one period, and for another period the new enactment, in his view.

It has always appeared to me that more titles will be defective, or questionable, under the new than under the old system.—The law, when founded on science and governed by first principles, is easy; but when it consists of abstract independent propositions, it requires memory only, and not science, to apply it. This is a great error in any useful science like the law.

These few and superficial observations will, I trust, justify me, as an old and zealous servant of the public, with

reference to the Laws of Property, in having, in my Inaugural Address at King's College, recommended that the study of the Laws of Property should precede the study of pleading, and the practice of the courts. There is one study—that of EVIDENCE—common to both branches of the profession. No individual can be an useful or eminent practitioner, as a Conveyancer, a Pleader at Law, or in Equity, or at the Crown Bar, unless he be familiar with the Rules of Evidence, and with the Law of Evidence as a science, by which his advice and his conduct in the particular branch of his professional pursuits must be governed. With great regard and esteem,

I am yours,

Very sincerely,

RICHARD PRESTON.

CHAPTER XII.

DEPARTMENTS OF THE PROFESSION.

II. CRIMINAL DEPARTMENT.

CROWN LAW—CRIMINAL LAW.

WHILE the great mitigation of the severity of our criminal law, during the last quarter of a century, bears splendid testimony to the humanity of the legislature, the sweeping alterations in the machinery and practical working of that law, not only effected during the same period, but at this moment under the consideration of Parliament, which contemplates a complete reconstruction of the fabric of the criminal law, upon a plan of equal boldness and novelty,—render it exceedingly difficult to write upon the subject of this chapter, satisfactorily.—Perhaps it may be said, that nearly two-thirds of the existing body of the criminal law, are the product of legislative enactment; which has made, during the course of several centuries, continually increasing inroads upon this section of the ancient common law of the land. Notwithstanding, however, this circumstance, let the student rest assured that he can never dispense with a sound *historical* knowledge of the *common* law respecting crimes and offences, if he desire to become thoroughly imbued with the genius and spirit of that law, and appreciate the

nature of the great changes effected in it by acts of parliament,—the evils and inconveniences intended to be redressed, and the mode in which such redress has been sought to be effected. He who is content with purchasing some practical hand-book, or treatise of criminal law *as it is*, and thence alone deriving his knowledge upon the subject, is a mere journeyman—a legal tradesman—utterly unworthy of being intrusted with business except of the most ordinary and inferior kind,—incompetent to sustain superior responsibilities, and encounter those important and difficult exigencies and emergencies, which often arise casually and unexpectedly out of criminal proceedings. From criminal law's affording the young barrister his earliest introduction to practice,—rushing, as he too frequently does, post-haste, and flimsily furnished with knowledge, from chambers to Sessions,—he is apt to underrate the importance and difficulty of early acquiring an accurate knowledge of the principles of the criminal law: and the result is often quickly apparent—he easily gets, perhaps, into the little circle of ordinary, matter-of-course cases at Sessions, and on circuit, and—*never quits it*. He, on the contrary, who, susceptible of superior impulses, and capable of higher aspirations, early applies himself with serious energy to the acquisition of deep and accurate knowledge of the past and present state of the criminal law, will not only feel, every day, fresh interest in the task, but be certain—*cæteris paribus*—of being able to avail himself, with signal advantage, of very many opportunities which will be entirely missed by his indolent, superficial, and incompetent rival. Nor let the young reader imagine that the great changes above adverted to, as being contemplated by Parliament, render

hopeless and nugatory the attempt to acquire this sort of knowledge, under the notion that the whole criminal law is in a state of transition and perpetual alteration. Even granting such to be the case, and likely to continue so for a long time to come—still, *that fluctuating changing criminal law he will be called upon to practise*; he cannot practise it unless he know it; and he cannot *know* it, unless he take the course suggested—which will render him comparatively independent of the consequences of change; for he will be master of those REASONS and PRINCIPLES which cannot alter, and will afford him an unerring and ready clue to those changes, by which others may be at once disheartened, confounded, and incapacitated from successful professional exertion. Even should that crowning change in the criminal law, which consists in its consolidation into one statute, be carried into effect, so as to render the future study and practice of the criminal law comparatively simple and accessible, our foregoing observations will nevertheless be of force equal to that which they possess during its existing state. Innumerable questions will be perpetually arising during the administration of the new system, however skilfully may be framed the contemplated code,—questions most frequently arising suddenly and in open court, and rendering necessary a reference to the pre-existing state of the law, whether common or statute, and the reasons on which the new system has proceeded. In addition to this, the new criminal code will necessarily leave untouched a large portion of the existing system, which for the purposes of explanation, analogy, and illustration, will require a continual reference to the works of Hale, Hawkins, Foster, East, Blackstone, and Russell.

There never yet occurred a state trial, or a criminal trial of importance, which did not illustrate the importance of the observations which we are offering, and exhibit the immense advantages attending an extensive, accurate, and ready knowledge of the grounds, and principles, and originals of the criminal law. The very last of these occasions supplies several striking instances, which only our limited space prevents our laying before the student. Let us now, however, proceed to a brief and general explanation of the existing criminal law.

The origin of our criminal law, must be looked for among the scanty records which we possess, of the jurisprudence of our Anglo-Saxon ancestors. Sufficient remain to demonstrate one interesting and valuable fact—that their punishments were entirely of a *pecuniary* nature; and so sensible were those stern and simple sons of freedom, even in those early times, of the danger of judicial discretion,* that they had a graduated scale of pecuniary compensation and punishment for all sorts of injury,† adjusted with the utmost exactness to the nature

* See 1 Reeve's Hist. p. 14.

† The following curious passage occurs in Mr. Turner's History of the Anglo-Saxons, vol. ii. App. iii. chap. ii. p. 515-6 [ed. 1839]. "The Saxon legislators were particularly anxious to distinguish between the different wounds to which the body is liable, and which, from their laws, we may infer that they frequently suffered. In their most ancient laws these were the punishments:—

"The loss of an eye, or a leg, appears to have been considered as the most aggravated injury which could arise from an assault, and was therefore punished by the highest fine, of 50 shillings.

"To be made lame, was the next most considerable offence; and the compensation for it was 30 shillings.

of the injury, the circumstances under which it was committed, and the rank and property of the party injured. This notion of compensation, observes Mr. Reeves, runs

“ For a wound which caused deafness, 25 shillings.

“ To lame the shoulder, divide the chine-bone, cut off the thumb, pierce the diaphragm, or tear off the hair, and fracture the skull, was each punished by a fine of 20 shillings.

“ For breaking the thigh, cutting off the ears, wounding the eye or mouth, wounding the diaphragm, or injuring the teeth so as to affect the speech, was exacted 12 shillings.

“ For cutting off the little finger, 11 shillings.

“ For cutting off the great toe, or for tearing off the hair entirely, 10 shillings.

“ For piercing the nose, 9 shillings.

“ For cutting off the forefinger, 8 shillings.

“ For cutting off the gold-finger, for every wound in the thigh, for wounding the ear, for piercing both cheeks, for cutting either nostril, for each of the front teeth, for breaking the jaw-bone, for breaking an arm, 6 shillings.

“ For seizing the hair, so as to hurt the bone; for the loss of either of the eye-teeth, or of the middle finger, 4 shillings.

“ For pulling the hair, so that the bone became visible; for piercing the ear or one cheek; for cutting off the thumb-nail; for the first double-tooth; for wounding the nose with the fist; for wounding the elbow; for breaking a rib; or for wounding the vertebræ, 3 shillings.

“ For every nail (probably of the fingers), and for every tooth beyond the first double tooth, 1 shilling.

“ For seizing the hair, 50 scættas. [A *scætta*, says Mr. Turner, was about the twentieth part of a shilling.]

“ For the nail of the great toe, 30 scættas.

“ For every other nail, 10 scættas.

“ To judge of this scale of compensations by modern experience, there seems to be a gross disproportion, not only between the injury and the compensation, in many instances, but also between the different classes of compensation. Six shillings is a very inconsiderable recompense for the pain and confinement that follow an arm, or a jaw-bone, broke; and it seems absurd to rank in punishment with these serious injuries, the loss of a front tooth. To value the thumb at a higher price than the fingers, is reasonable; but to estimate the little finger at 11 shillings, the great toe at 10 shillings, the fore-finger at 8 shillings, the ring-finger at 6 shillings, and the middle-finger at 4 shillings, seems a very capricious distribution of recompense.

through the whole criminal law of the Anglo-Saxons, from the most petty delinquency up to and including murder. Every one's life had its *WERE*, or *capitis estimatio*; the king himself had his *WERE*: by which was signified the compensation allotted to the family or relatives of the deceased, for the loss of his life. In their treatment of homicide is to be perceived the germ of the grand distinction in the law between private and public wrongs. In addition to the *WERE* (or private redress to the family of the deceased), there was imposed on the homicide, the *WITE*—which was a pecuniary fine, constituting the satisfaction rendered to the community for the public wrong which had been committed. It was paid to the magistrates presiding over it, and raised according to the dignity of the person in whose jurisdiction the offence had been committed.* We see thus the antiquity of our existing system of awarding pecuniary *fines* and *damages*: of which, together with another feature of our criminal polity, viz., the *giving sureties*, and other interesting matters, there will be found an excellent account in the brief "History of the Laws of the Anglo-Saxons," constituting the Third Appendix to the second volume of Mr. Turner's History of the Anglo-Saxons. To trace the gradual introduction of the other kinds of punishment, by death, mutilation, tran-

So the teeth seem to have been valued on no principle intelligible to us: a front tooth was atoned for by 6 shillings, an eye-tooth by 4 shillings, the first double tooth 3 shillings, either of the others 1 shilling. Why to lame the shoulder should occasion a fine of 20 shillings, and to break the thigh^o but 12, and the arm but 6, cannot be explained, unless we presume that the surgical skill of the day found the cure of the arm easier than of the thigh, and that easier than the shoulder."

* 1 Reeve, pp. 14 *et seq.*; 2 Turner, Anglo-Sax. App. iii. c. ii.; 4 Black. Com. by Coleridge, 313, (note 12).

sportation, fine, imprisonment, corporeal punishment, and the imposition of hard labour, is beyond our present scope. We therefore refer the student to Mr. Reeves' learned History of the English Law, and to other works which can be pointed out to him by any experienced adviser.

The distinction between *civil* and *criminal* injuries, indicates those offences which are regarded by the law as committed respectively against private individuals, or the public. Mr. Justice Blackstone defines a crime thus: "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it :"* but as Mr. Justice Coleridge has observed in a note to his edition of the Commentaries, it is not very easy in theory, and quite impossible, according to the English law, to lay down any single principle by which to distinguish crimes from civil injuries,—private from public wrongs. "By the English law a distinction exists, but it seems wholly technical; depending sometimes on the situation of the agent; sometimes on the nature or relations of the thing which is the object of the act; sometimes on the manner in which the act is done; sometimes on the consequences of the act; the time of doing it; and other grounds which it would be useless here to enumerate, because they can be learned thoroughly, only by an acquaintance with the law itself."†

Without stopping to inquire into the justice of these observations, and of the learned annotator's censure of the passage in the Commentaries to which the note in question is appended, we may observe that, for all practical purposes, the distinction may be regarded as having been

* 4 Bla. Com. 5.

† 4 Bla. Com. p. 7 (N. 3).

for ages recognised, and thoroughly established in our law; and it is thus satisfactorily explained in another part of the Commentaries.* “ Wrongs are divisible into two sorts or species, *private* wrongs, and *public* wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, *considered as individuals*, and are therefore termed CIVIL INJURIES: the latter are a breach and violation of public rights and duties, which affect the whole community, *considered as a community*; and are distinguished by the harsher appellation of ‘CRIMES AND MISDEMEANORS.’” The commentator, in thus speaking of crimes ‘*and*’ misdemeanors, must be understood as only adopting, for a moment, a popular phrase, in conformity with the explanation which he gives of the same matter in an ensuing page: viz., that the word “ ‘crime’ is popularly used to signify offences of a deep and atrocious dye; whilst the gentler word ‘misdemeanor,’ comprises smaller faults and omissions.” It is rather singular that the loose and popular phrase in question, should have been adopted by Mr. Serjeant Russell as the title of his valuable Treatise on Criminal Law—viz., “On *Crimes and Misdemeanors*.” The former word includes the latter. A “crime” is an offence; and offences consist, as we shall presently explain, of felonies and misdemeanors. Taking then the word ‘crime’ to signify, substantially, *any offence for which any criminal punishment may by law be inflicted*,† they are of two kinds, —those of TEMPORAL, and those of ECCLESIASTICAL cog-

* 3 Bla. Com. p. 2.

† This is the definition of the word “crime” given by the Revised Statutes of New York (2 R. S. 702, § 33). See Barbour’s Criminal Treatise, p. 17.

nizance.* The latter will be considered in the next chapter.

Temporal offences are usually divided into two grand classes, FELONIES and MISDEMEANORS. I. FELONY. This term appears to have been long used to signify the degree or class of crime committed, rather than the *penal consequence, of forfeiture*, occasioned by the crime, according to its original signification.† The proper definition of it, however, is that based upon the notion of forfeiture, and given by Blackstone: *i. e.*, “an offence which occasions a total forfeiture of either lands or goods, or both, *at the common law*, and to which capital, or other punishment, *may* be superadded, according to the degree of guilt.” The word is clearly one of feudal origin: indeed, “felony” and “forfeiture to the lord,” are, in the feudal law, synonymous terms:‡ whence it came to pass, that on the introduction of that law into this country, those crimes which induced the forfeiture of lands, and at length of goods also, were denominated FELONIES. Thus it was said that suicide, robbery, and rape, were *felonies*,—*i. e.*, the consequence of committing such crimes, was forfeiture: so that, by long use, we began, as has been seen, to signify, by the word “felony,” the actual crime committed, and not the penal consequence.

II. MISDEMEANOR. By this word is signified, when contradistinguished from the word “felony,” any crime less than a felony: as perjury, libels, conspiracies, public nuisances, attempts to commit felonies, or even misdemeanors,§ and so forth. All crimes and offences for

* 1 Hale's Pleas of the Crown, Proem.

† 1 Russ. on Crimes and Misd. p. 44 (3d ed.) ; 4 Bla. Com. 95.

‡ 4 Bla. Com. 97.

§ Higgins' Case, 2 East, 8.

which the law has not provided a specific name, come under this denomination : and the common law punishment of a misdemeanor is by fine or imprisonment, or by both.

It is said above, that Felonies and Misdemeanors are the two grand classes of crimes : but here let us make one or two general observations. *First*, Though the offence of High Treason is undoubtedly a Felony ;* still it is an offence of such a special and fearful nature, that it is generally ranked by itself ; most writers on criminal law classing offences thus :—" Treasons, Felonies, and Misdemeanors." *Secondly*, The word "OFFENCE" is generally used to indicate those crimes which are not indictable, but *punishable summarily*, or by the forfeiture of a *penalty*.† *Thirdly*, Whether a particular offence be a felony or a misdemeanor, is a question which can now rarely arise ; inasmuch as the Legislature has itself, in a vast majority of instances, during the progress of the Criminal Law Reform, undertaken to define what acts shall constitute *felonies*, and what *misdemeanors* ; specifying also the punishment to be inflicted on those convicted of either. *Fourthly*, There exist many felonies and misdemeanors, *at common law*, as well as those which have been expressly created by acts of Parliament. *Lastly*. Whenever a statute prohibits a matter of *public* grievance, or enjoins a matter of *public* convenience, but omits to annex any penalty to disobedience of its requisition (in jurisprudential language omitting the *sanction* of the law‡) such disobedience constitutes an indictable misdemeanor, punishable by fine and imprisonment.

* 4 Bla. Com. 94 ; 3 Inst. p. 15.

† 1 Chitt. Gen. Prac. p. 14.

‡ See Austin's Province of Jurisprudence defined, p. 24.

With this brief intimation of the nomenclature of crime in England, we proceed to apprise the student that there are two grand engines of criminal prosecution, viz., by INDICTMENT, and by INFORMATION. The former is the only mode of prosecution in cases of Treason and Felony: but Misdemeanors may be prosecuted by either an Indictment or an INFORMATION: Dr. Burn justly observing that the indictment, which is founded on the finding of a Grand Jury, is "the most constitutional, regular, and safe mode of proceeding upon criminal charges."*

The following are the leading features of the change which the Criminal Law of this country has undergone during the last quarter of a century. *First*, The severity of the criminal law has been prodigiously abated, by abolishing the punishment of death in a very great number of cases. In Blackstone's time there were no fewer than one hundred and sixty capital offences:† there are now scarcely a dozen—and even in the majority of these cases, the capital sentence is rarely carried into effect. Our criminal law may now be pronounced one of the mildest in the world. At the same time, however, that capital punishment has been thus extensively abandoned, the remaining modes of punishment, by transportation and imprisonment, have, as a necessary compensatory process, been greatly increased, in respect of both duration and severity. *Secondly*, The unwieldly bulk, and almost hopeless intricacy arising out of the accumulation of criminal statutes, has been most beneficially reduced and simplified, principally under the auspices of Sir Robert Peel, by consolidation. On the 21st June 1827, were enacted five

* Burn's Justice, title "Indictment."

† 4 Bl. Com. 18.

statutes (7 & 8 Geo. IV., cc. 27—31), generally passing under the name of "*Peel's Acts*," which effected a vast improvement in the criminal law, by repealing a great number of statutes, consolidating their principal provisions, with important improvements, defining offences with precision, and diminishing the number of capital punishments. The example then set has been since vigorously followed; and many bold and beneficial alterations have been effected, down to the present time. The process of consolidation—perhaps we should say, *codification*—of the criminal law, is at this moment (1845), as we have already intimated, on the eve of being carried out to its uttermost extent, by the condensation of the whole criminal law into a single statute: with what success, time alone can determine. The undertaking is one of great magnitude and responsibility, requiring the highest amount of talent, learning, and discretion, in those to whom it has been confided. The gentlemen who have been selected for this purpose, however, are worthy of the confidence which has been reposed in them: and if subjected to no undue pressure, inducing a precipitate termination of their labours; and if the result of their exertions shall receive the invaluable—nay, the indispensable revision—of the judges, whose experienced sagacity contributed so greatly to the efficacy of the former consolidation of the criminal statutes—then will the learned persons in question have, indeed, erected for themselves *monumentum ære perennius*. If, however, in conducting such an enterprise, they be guilty of "making more haste than good speed," language can scarcely exaggerate the amount of mischief which they will have entailed upon the community. *Thirdly*, The change most directly interesting to the student, is that which enabled all prisoners charged

with felony, to be heard by counsel, both when charged before the magistrates, and on their trial. Another most important right has also been conferred upon prisoners,—viz., that of inspecting, and taking copies of the Depositions on which they have been committed. Under this head may also be mentioned, in terms of unqualified eulogy, the increasing efforts made by the legislature to attain the great end of all punishments, viz., the reformation of the offender,—by so moulding and limiting the punishment imposed, as to afford every possible chance for repentance and amendment. The system of prison discipline has been vastly improved, and is at this moment occupying the anxious attention of the government and legislature.—Among other beneficial changes may be also noticed, the abolition of Benefit of Clergy; the allowing persons charged before magistrates, with felony, to be *bailed*, even after a confession of the offence (5 & 6 Will. IV., c. 33, § 3); the allowance of costs to prosecutors and witnesses, in cases of felonies, and many misdemeanors; the provisions made for preventing the mischievous consequences of divers technical errors committed in conducting legal proceedings; the virtual abolition of the criminal jurisdiction of the Court of Admiralty; and the establishment of the Central Criminal Court. Another important feature of recent criminal legislation, is the great augmentation of the summary jurisdiction of magistrates. It is necessary, however, for the attention of parliament and the public to be kept steadily directed to this matter, or the fabric of our liberties may be undermined to an extent not for some time perceptible. The power in question is “in restraint of the Common Law, and, in abundance of instances,” says Dr. Burn, “a tacit repeal of that famous clause in the

Great Charter, that a man shall be tried by his equals, which was also the common law of the land long before the Great Charter, even from time immemorial, beyond the date of histories and record.”* This matter requires to be only the more vigilantly watched, because of its directly and principally concerning the inferior classes of society.—Such is a faint and imperfect outline of the leading changes effected during the present century, and also of those now under the consideration of the legislature, in the administration of the criminal law.

Let us now, however, advert to the intimation given in a preceding chapter,† concerning the distinction between the “Crown Law,” and the “General Criminal Law,” administered in the Court of Queen’s Bench, give a little fuller explanation of this matter.

The Court of Queen’s Bench consists, in the language of Sir Matthew Hale,‡ of two kinds of jurisdiction, viz., the Civil Jurisdiction, or the Plea Side, of which we spoke in the tenth chapter, and the Criminal Jurisdiction, or the Crown Side. Till the time of Edward II., the matters of both kinds were entered promiscuously in the rolls; but the rolls were then discriminated, and those of the Crown Side entitled “*Rex*,” though both were piled up in the same bundles. And thus it continued very long: but of later times, the records of civil pleas are bound up by themselves, and the records of pleas of the Crown bound up by themselves, and kept in the Crown Office, under the immediate custody of the Coroner of the Queen’s Bench, who is also the Queen’s attorney in that Court, and

* Burn’s Justice, tit. “Conviction.” See also 4 Bla. Com. 280.

† Chap. viii. p. 287.

‡ 2 Pleas of the Crown, p. 2.

clerk of the Crown. Thus the Court of Queen's Bench exercises a twofold jurisdiction, civil and criminal: and it is of the latter only that we are now, very briefly, to speak.

The Court of Queen's Bench is the supreme court, in criminal matters, in England and Wales; and every one of its judges, unlike those of the Common Pleas and Exchequer, has, as incident to his office, a general authority to keep the peace throughout all the realm, and to award process for the sureties of the peace, and to take recognizances for it.* Such power belongs to the judges of the other two courts only within the precincts of their own courts, and when invested with the commission of the peace, on circuit. How the Queen's Bench came to possess, and retain this branch of its jurisdiction, we explained in a previous page.† By indictment, it has original jurisdiction in all criminal cases, whether Treason, Felonies, or Misdemeanors—committed within the county in which the court sits—i. e., in Middlesex. In practice, however, it never exercises that jurisdiction in Treason or Felony, except on occasions of sufficient magnitude to warrant the Attorney-General in requiring a trial at Bar. In ordinary cases, Treasons, and the graver felonies committed in Middlesex, are tried at the Central Criminal Court; and the inferior felonies are also tried there, and at the Courts of Quarter Sessions for Middlesex and Westminster. For the purposes of this original jurisdiction, two grand juries for the county of Middlesex, taken from different Hundreds within it, are summoned to the court every term, and charged by the senior puisne judge; and after disposing

* Hawkins, P.C., B. II., c. viii., § 2.

† *Ante*, p. 443, *et seq.*

of various matters of petty routine county business, find true bills for misdemeanors, in all such cases as have been presented to them for that purpose. These indictments are then filed in the Crown Office, and are tried at the sittings at Westminster, with the civil causes: but it is believed that seldom more than one or two such indictments are preferred, in a term. As a court of supervision and control, as we shall presently see, the Court of Queen's Bench, as the Supreme Criminal Court in the country, has jurisdiction of all indictable offences committed within England and Wales. It may cause any indictment found within England and Wales to be brought before it by writ of *certiorari*, and it thereby becomes immediately a record of the Court; and is afterwards sent for trial at *Nisi Prius*, at the assizes for the county, &c., within which the offence is alleged to have been committed; or *after judgment*, the record of any indictment tried in any county, &c., within England or Wales, may be brought before the Court of Queen's Bench, by writ of error. By *Information*, however, this court has cognizance over all misdemeanors committed anywhere in England or Wales; sending the cases to be tried before the judges at *Nisi Prius*, at the sittings or assizes of the county where the offences are alleged to have been committed.—Thus we see that the direct administration of the general criminal law, by the Court of Queen's Bench, is now exercised on a limited scale; being confined to extraordinary cases of treason and felony, and to those of misdemeanor, in the few cases commenced there originally, as above explained, or in those withdrawn into it by *certiorari*, from other tribunals, on special grounds. Let us now, however, proceed to explain the general nature of that portion of the business of the

Queen's Bench called Crown Law, which, in a former chapter,* we ventured to designate as a kind of *quasi* criminal law.

I.—CROWN LAW.

This department may be conveniently divided into three branches: 1st, the Original proceedings on the Crown side; 2ndly, the proceedings as a Court of Supervision, or Appeal; 3rdly, the Collateral proceedings.

I. The Original proceedings on the Crown side of the Queen's Bench, consist of Indictments, and Informations. Of these we have already spoken, perhaps sufficiently, in the preceding paragraph; from which it will be seen that these functions of the court are exercised principally upon misdemeanors. (1.) An **INDICTMENT** is an accusation at the suit of the Crown, *found to be true by the oaths of a grand jury*. Those with which this court has mainly to deal, are for assaults and battery; libels; nuisances; perjuries; conspiracies; non-repair of roads, bridges, &c. &c. When cases are removed from the sessions, in any part of England and Wales, by *certiorari*, into the Queen's Bench (generally for the purpose of securing a superior jury, superior counsel, and a trial before one of the judges of the superior courts), they are tried, at the Sittings or Assizes for the county, &c., where the bill was originally found. (2.) An **INFORMATION** differs from an indictment, as far as its structure is concerned, in nothing but the formal commencement and conclusion of it.† The grand distinction between the two is, that while the Indictment is an accusation found by the oaths of a grand jury,

* Chap. viii. p. 287.

† See specimens of Indictments and Information in the Appendix, No. 1.

the Information is merely the allegation of the officer who exhibits it. There are two principal kinds of information,—first, those filed in the Queen's Bench, by the Attorney-General "*ex officio*," for the punishment of offences affecting the safety of the Crown, or interests of the public; secondly, those filed in the same court, by the Queen's coroner and attorney, in such cases of indictable misdemeanors,* as more peculiarly affect individual rights. These are popularly known by the name of "criminal informations;" and are usually adopted against magistrates, and other inferior judges, and parish officers, who have been guilty of misconduct, oppression, or corruption; against other persons in cases, for instance, of libel; challenges to fight; breaches of the peace; and in gross instances of public indecency. In all such cases of Informations filed by the Queen's coroner or attorney, *the leave of the court* must be first obtained,† on affidavits of the facts out of which the application arises; and their discretion is governed by such considerations as—the promptitude with which the application is made; the *bona fides* of the applicant; the clearness of the misconduct alleged, and the grave character of it. They will not grant a rule for a criminal information where, for instance, the applicant has adopted another remedy—or is himself to blame—or has been guilty of undue delay—or where the affidavits are contradictory, or the offence of a trivial character, and the motives of the applicant malicious or oppressive: for before granting the appli-

* See *Ex p. Chapman*, 4 Ad. & Ell. 773.

† This is in consequence of statute 4 & 5 W. & M., c. 18, § 1, passed to prevent the grievous evils arising out of the right which every private person till then had, of causing a criminal information to be filed for any misdemeanor, however trifling, or unfounded in fact. See *Arch. Cr. Pr.* p. 17.

cation, the court will hear both sides, on affidavits, in order to ascertain the real state of the facts, and to decide whether they will interfere by granting this extraordinary method of proceeding, or whether they will leave the party to his ordinary remedy *by indictment*. This branch of business occupies a very great portion of the time of the court.—If an information be granted, it is then tried before the jury, like an indictment. Another distinction between these two kinds of informations is, that while that by the Queen's coroner and attorney cannot be obtained without the leave of the court, the Attorney-General may file his information against any one whom he may choose to proceed against, and without asking the leave of the court. There is one particular kind of information which also occupies much of the time of the court—viz., informations in the nature of a *QUO WARRANTO*; which are filed by either the Attorney-General *ex officio*, or by the Queen's coroner and attorney, for the purpose of trying civil rights to offices and franchises, and in cases of corporation offices of a public nature. When any individual, or body politic, has intruded into, usurped, or assumed to act on, any franchise, liberty, office, or privilege, not being legally entitled to it, and is supposed to have thereby injured either another party really entitled to the office, or franchise, or the public; by a *quo warranto*, the party whose conduct is challenged, is called upon to show *by what authority (qua warranto)* he has so acted. It is only *formally* a criminal proceeding: in substance, and in fact, it is of a purely civil nature. This is a most important and extensive jurisdiction, and peculiar to the Court of Queen's Bench. When the information has been filed, the defendant *pleads* to it, according to the nature of his defence; and the questions raised, whether of law or fact,

are decided by the Court or a jury accordingly. The informations above mentioned, are at the suit of the Queen only ; but there are certain others which are partly at the suit of the Queen, and partly at that of a subject, and which are called *qui tam* informations, from the words in the information (when the proceedings were in Latin), "*Qui, tam pro dominâ reginâ, quam pro se ipso.*" So much for the first branch of the business of the Crown Office of the Queen's Bench. We come next to,

II. Proceedings on the Crown side of the Queen's Bench, as a Court of *Supervision*, or *Appeal*. Its powers are here exercised by means of three great engines—Certiorari, Writ of Error, and Mandamus.

I. A CERTIORARI is a writ issuing from the Crown side of the court, directed to Justices at Sessions, to Justices of the Peace, Judges of inferior Courts, to Coroners, Commissioners, and others, requiring them to "*certify*" to the Court of Queen's Bench some indictment, conviction, order of sessions, order of justices, or other order or matter of a judicial and public nature depending before them, in order that the Court of Queen's Bench may then deal with it as they may think fit. It is by means of this writ that the court exercises its superintending jurisdiction over these inferior tribunals, and quashes or confirms their acts, or assumes to itself the cognizance of matters which, from circumstances, can be proceeded upon with more certainty of justice to the parties, before that court, than before the inferior tribunal,* or those official persons whose acts are liable to be thus subjected to the control of this powerful jurisdiction. By means of this writ, either the prosecutor or defendant may have an INDICTMENT withdrawn from the

* Archbold's Pr. Crown-office, p. 153.

inferior tribunal, for the purpose of making it a record of the Court of Queen's Bench, and having it thence sent for trial at the assizes: but either party must first satisfy the court, by affidavit, of the probability that the case will not be satisfactorily tried in the court from which it is sought to be removed. CORONERS' INQUISITIONS are also thus removed into the Queen's Bench, generally for the purpose of being quashed, for defects and errors in them. If the absurd law of deodands should, however, as is likely, be abolished, one consequence will be the infrequency of the application of a *certiorari* to these Inquisitions: to get rid of a heavy deodand, or of a forfeiture arising out of an erroneous verdict of *felo-de-se*, being at present the great object on such occasions. SUMMARY CONVICTIONS by MAGISTRATES may be thus reviewed, in all cases of error appearing on the face of them, whose convictions undergo a most rigorous scrutiny. The court's authority is here a grand shield against oppression and other consequences of magisterial incompetence.* So, also, all orders of justices, whether made at sessions, or out of sessions, may be quashed, if erroneous on the face of them.—It is by this means that the validity of ORDERS OF REMOVAL of PAUPERS, and of POOR'S RATES; of orders made by the POOR LAW COMMISSIONERS; COMMISSIONERS OF SEWERS; TITHE COMMISSIONERS; of orders of TOWN COUNCILS for the payment of money out of the Borough Fund, is investigated and

* See the notes to the Case of *Creppe v. Durdan*, in 1 Smith's Leading Cases, pp. 387, *et seq.* (2d Ed.), where the requisites of valid convictions by Magistrates are given very concisely and lucidly; the author assigning as his reason for doing so, the daily increasing importance of the subject, from the augmented powers of this nature given to magistrates, and the disfavour with which such powers are justly regarded by the courts, on grounds already suggested, (*ante*, p. 594).

determined. Thus, also, are all INQUISITIONS, EXAMINATIONS, DEPOSITIONS, and RECOGNIZANCES brought under the review of the court, under a great variety of circumstances, principally with a view to a defendant's being bailed;—and thus also the exercise of the powers conferred by Acts of Parliament upon Railroad Companies, and in case of other public works, is examined and determined upon. A glance at this paragraph suffices to show the simplicity, directness, and efficiency with which this salutary form of supervision is brought to bear upon almost every species of official error, or misconduct prejudicial to the public or to individuals: a power so inherent in the Court of Queen's Bench, that nothing short of an express prohibition by Act of Parliament can prevent their exercise of it. To prevent the abuse of the writ of *certiorari*, by wanton and improvident application for it, on the part of either prosecutor or defendant, statute 5 & 6 Will. IV. c. 33, has two important and salutary provisions—viz., the previous leave of the Court granted to a prosecutor, and recognizances to be entered into by a defendant.

NOTE.—If a *certiorari* should have been obtained irregularly or improperly, or upon a false or fraudulent statement, the court will order a writ of *PROCEDENDO*, commanding the party whose acts are appealed against, to proceed with the case, disregarding the *certiorari*. Somewhat analogous to the procedure by *certiorari*, is that by *PROHIBITION*, of which a sufficient account has been already given, (p. 317.)

II. WRIT OF ERROR.—This need not occupy much of our attention. *After judgment* given against a defendant, either at sessions, or the assizes, in a criminal case, if there be a substantial defect in the indictment, or error apparent on the record, such judgment may be reversed

by the Court of Queen's Bench. Before, however, this writ can be sued out, it is necessary to obtain the Attorney-General's *Fiat*: which, in misdemeanors, on sufficient cause shown, is granted as a matter of course: but in felonies, it is granted only *ex gratia*.

III. MANDAMUS.—This “high prerogative writ”—the “flower of the Court of Queen's Bench,” has already been incidentally mentioned (*ante*, p. 316), in discussing the analogous powers of a Court of Equity to compel specific performance, and issue an injunction. The grand condition of obtaining a writ of mandamus, is, that the applicant has a *specific legal right, with no specific legal remedy for a deprivation of that right*. The writ issues to judges of inferior courts of judicature, corporations, public bodies, and others on whom the law casts a public duty: alleging that complaint has been made to the Court of a refusal to perform that duty on some particular occasion, and commanding them, in the Queen's name, to do it, “or *show cause to the contrary* thereof, lest, on default, the same complaint should be repeated” to the Court. When a proper case for such an application has been made, the following is the course adopted. On a full and accurate statement of the facts by affidavit, the Court will grant a rule, calling upon the party whose conduct is impugned, to *show cause* why the mandamus should not issue. If no sufficient ‘*cause*’ should be shown, the rule is made absolute, and the mandamus issues accordingly, in the alternative form given above. To this writ, a RETURN must be made: and if it be deemed by the Court insufficient, then they will issue a PEREMPTORY MANDAMUS, which must be obeyed, under pain of attachment for the contempt: and the Court will permit no *return* to be made to this

peremptory mandamus, except that what had been commanded to be done, has been duly done.—When this writ is applied for in a matter of mere *private* right,—e. g. of admission, or restoration to an office,—it is a matter of discretion with the Court to grant or withhold it: but when sought for to enforce obedience to acts of parliament, or the Queen's Charter, it is demandable as of right. This writ issues in a vast variety of cases, which may be thus generally classified. To justices, in or out of sessions, and other inferior tribunals; parish officers; municipal corporations or corporators; public companies; public bodies; public commissioners; public trustees; lords of manors; in ecclesiastical, and some other cases. The preparation of the various proceedings in mandamus,—i. e. of the affidavits to obtain it, the mandamus itself, the return and the pleadings to it, is the province of counsel, and generally requires much experience and discretion; the consequence of a mistake being often very serious—as the proceedings are frequently of a voluminous and intricate character, and attended with much expense.

III. The third (and last) head of the business of the Crown Office of the Court of Queen's Bench,—viz., the Collateral proceedings, need not detain us long. They consist of Articles of the Peace; Attachments; and Writs of Habeas Corpus. I. ARTICLES OF THE PEACE.—When serious personal injury is apprehended from, or has been threatened by, another, the party apprehensive of it may demand the surety of the peace against him. In ordinary cases, this procedure is adopted at the sessions, or before the police magistrates, or a justice of the peace—but if it be sworn that the local magistrates have refused to interfere, or if the parties be of high rank,—as peers or peeresses—

or if the circumstances of the case invest it with sufficient importance, these articles of the peace are exhibited in the Court of Queen's Bench, according to the course prescribed by statute 21 Jac. I. c. 8. II. **ATTACHMENTS** are the mode of procedure by imprisonment, or fine, or both, against parties guilty of a contempt of the authority, or disregard and disobedience of the rules of the Court. III. **HABEAS CORPUS**.—The different kinds of these writs, and the procedure under each of them, are matters of capital practical importance, and requiring the best exertions to master them, on the part of students and practitioners; but into any particular consideration of such topics, it would be beyond our province to enter.

NOTE.—The Courts of Common Pleas and Exchequer have equally with the Queen's Bench, the power of enforcing their rules, and punishing contempts, by *attachment*; and have also, for most purposes, a common user of the machinery of habeas corpus.

Such being an outline of the nature of the Crown practice in the Court of Queen's Bench, it is necessary to mention that a complete revolution has been recently effected in its administration, by stat. 6 & 7 Vict. c. 20 (passed on the 31st May, 1843). This statute abolished the monopoly of practice on the Crown side, till then existing, and threw it open to all persons admitted, or *admissible*, to practise, as attorneys of the Court of Queen's Bench—i. e. to attorneys generally; abolished several ancient offices, and many burthensome fees; and, in short, remodelled the whole establishment (§ 1), which it has certainly placed on a very satisfactory basis. It is now subjected to the direct and powerful control of the Lord Chief Justice. There are now only three officers of

the Crown side—appointed by the Lord Chief Justice—viz., the Queen's coroner and attorney (salary £1200), the master (£1200), and assistant-master (£600): their office is held during good behaviour; and persons eligible to fill them, are barristers and pleaders, in actual practice, of not less than five years' standing, and attorneys of the Court, in actual practice, and of the same length of standing.—In consequence of these important changes, Mr. Archbold published, shortly afterwards (1844), his valuable little work on the "Practice of the Crown Office," and from which the present writer has adopted the main arrangement of the foregoing section. It remains to be stated that there are appropriated to the Crown business of the Court of Queen's Bench two days—Wednesday and Saturday—(called "*Crown Paper Days*,") in each week during term. On these days no other business is transacted unless the Crown business should have been disposed of before the time for the rising of the Court. It has often occurred to the author that the present enormous pressure upon the Queen's Bench, might be advantageously and conveniently diminished, by devolving upon the Common Pleas a portion of the Crown business. Why quo warrantos, mandamuses, and session cases should not be there satisfactorily disposed of, it seems difficult to imagine. Let us now, however, proceed to the administration of

II.—THE GENERAL CRIMINAL LAW.

I. THE CENTRAL CRIMINAL COURT is by far the most important criminal tribunal in this country, as well from the authority of the judges who preside there, as from the number and magnitude of the crimes which are

tried before it. This court was erected in the year 1834, by statute 4 & 5 Will. IV. c. 36; which, reciting that it was expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis, and certain parts adjoining thereto, should be tried by justices and judges of oyer and terminer, and gaol delivery in the city of London,—proceeded to constitute a new tribunal, which it entitled “The Central Criminal Court”—to consist of the Lord Mayor; the Lord Chancellor; the judges of the three superior courts at Westminster; the judges in bankruptcy; the judge of the Admiralty; the dean of the arches; the aldermen, recorder, and common sergeant of London; the judges of the sheriffs’ court; and any person who had, or shall have been, Lord Chancellor, a judge of any of the superior courts at Westminster—or who might be thereafter appointed by general commission of the Queen. To this court Her Majesty may issue commissions of oyer and terminer, and gaol delivery, for the trial of all cases of treasons, murders, felonies, and misdemeanors, committed within the city of London and county of Middlesex, and in certain specified parts of the counties of Essex, Kent, and Surrey—all of which constitute a district, which is to be, for the purposes of that act, deemed and taken to be *one county*. The Court sits at the Sessions House, in the Old Bailey; and there are at least twelve sessions held in every year, at times fixed by any eight of the judges at Westminster. Two provisions in this statute, and also several subsequent statutes, greatly augmented the jurisdiction of this potent tribunal, by first, curtailing that of the courts of quarter sessions within the district assigned to the Central Criminal

Court, and restraining them from trying nearly all the serious kinds of felony (4 & 5 Will. IV. c. 36, § 17), and by transferring to it the entire criminal jurisdiction of the Court of Admiralty (§ 22); followed up, in 1837, by statutes 7 Will. IV. & 1 Vict. cc. 84-89, by the operation of which, all the serious offences punishable under them, if committed within the jurisdiction of the Admiralty, may be, and have ever since been, tried at the Central Criminal Court.—During every session two of the judges of the superior courts at Westminster preside in this Court, for the purpose of trying the more important offences. The remainder are tried by either the Recorder, or Common Serjeant, or a judge from the sheriffs' court, commissioned for that purpose; on every occasion the Lord Mayor, or some of the Aldermen, being also present on the bench. There are two courts adjoining each other—which sit simultaneously; and the Bar attending them is a limited one, consisting mainly of those members of the Home Circuit, who confine themselves almost altogether to sessions practice.

II. THE COURTS OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY, AT THE ASSIZES,—or the administration of criminal law on the circuits.—The judges, on circuit, exercise their judicial authority by virtue of no fewer than FIVE COMMISSIONS issued to them by the Crown, for the purpose of disposing of the criminal and civil business throughout England and Wales (except in Middlesex and the city of London). First, the commission of *assize*; secondly, of *nisi prius* (this being their authority for dealing with civil business); thirdly the commission of the peace; fourthly, the commission of oyer and terminer; and fifthly, the commission of general

gaol delivery. It is from these latter that the judges derive their jurisdiction over criminal matters. By the commission of *oyer* and *terminer*, they inquire (i. e. by means of the grand jury), *hear*, and *determine* (i. e. by means of the petty jury) all treasons, felonies, and misdemeanors, for which indictments have been presented at the same assizes at which the commission was opened. *This* commission, however, would not empower them to deal with prisoners against whom indictments had been prepared at a *previous* assize: and hence the necessity of the last commission,—that of GENERAL GAOL DELIVERY—which empowers them to try and deliver every prisoner who may be in gaol when the judges arrive at the circuit town, whenever, or before whomsoever indicted, or for whatever crime committed.—These are the great ambulatory criminal courts of England, for administering the general criminal law throughout the land, in all those cases deemed of too serious a nature to be disposed of by the inferior and local tribunals, called the sessions courts; to which we will now proceed.

III. SESSIONS OF THE PEACE, by which is designated a *sitting* of Justices, for the execution of the powers confided to them by their commission, and by Acts of Parliament, are of two kinds—the COUNTY SESSIONS; and the BOROUGH SESSIONS.

§ I. The COUNTY SESSIONS consist of the GENERAL QUARTER SESSIONS OF THE PEACE* for each county,

* The distinction between "General Sessions" and "Quarter Sessions" is one of importance. *Vide* the late case of *Regina v. Justices of Middlesex*, 4 Q. B. 807; and *Chitty's Book's Justice*, title "Sessions of the Peace"—*prope initium*. Quarter Sessions are a species, only, of the General Ses-

which are held four times a year,—viz., in the first week (on some day fixed by the magistrates) after the 11th of *October*, the 28th *December*, the 31st *March*, and the 24th *June*, in every year,* provision being made to prevent the April Sessions clashing with the Spring Assizes.† The General Quarter Sessions for the county of Middlesex, have recently been remodelled by statute 7 & 8 Vict., c. 71, which requires two sessions to be held monthly—the General Quarter Sessions being the first of those held in the months of *January*, *April*, *July*, and *October*; and the *general* Sessions being the second, or adjourned sessions held in the months of February, May, August, and November, and such other sessions as shall be fixed by the magistrates at the first sessions held in December. An “Assistant Judge” was also appointed by that Act to preside at the trials of appeals, felonies, and misdemeanors, with a salary of twelve hundred pounds a year: but his appointment is not to supersede or interfere with that of the Chairman of the Court, or any of his functions, except in the cases above mentioned. By § 11 of this act, the sessions for the city of Westminster would

sions; and such only are properly called “*General Quarter Sessions*,” as are held in the four quarters of the year, in pursuance of the statute (11 Geo. IV. & 1 Will. IV. c. 70, § 35). Any other Sessions, held at any other time, for the general execution of the justices’ authority, are properly called “*general Sessions*.” those held on a special occasion, for some special purpose, are “*special Sessions*,” and are convened by reasonable notice to the other magistrates of the division; in which important respect they differ from “*Petty Sessions*,” with which nevertheless they are often confounded: for the Petty Sessions may be held by any two justices, of their own mere motion and agreement, for the transaction of such business as they are legally authorised to perform.—See per Bayley, J., in *R. v. Justices of Worcestershire*, 2 Barn. & Ald. 233, and Hawk. b. ii, c. viii. § 47.

* Stat. 11 Geo. IV. & 1 Will. IV. c. 70, § 35.

† Stat. 4 & 5 Will. IV. c. 47.

seem to be clearly abolished. County General Quarter Sessions have both a criminal and civil jurisdiction: the former having recently undergone very great restrictions, as also has been the case, as we shall presently see, with the borough sessions. The civil business of the Quarter Sessions comes before it chiefly as a court of *appeal*, deriving its authority from various statutes. This appellant jurisdiction extends over penal convictions; orders of Justices; matters connected with the administration of the Poor Laws; vagrant laws; the highways, and a great variety of other acts.* These appeals now constitute by far the most difficult and important portion of the business at Quarter Sessions.

§ II. The BOROUGH SESSIONS are those established in boroughs under the Municipal Corporations' Act (stat. 5 & 6 Will. IV., c. 76, § 103, *et seq.*). These courts are held by the Recorders (who must be barristers of not less than five years' standing) of the respective boroughs, once a quarter, or oftener, if they think fit, and at times to be fixed by them; and these courts, of which the Recorders are the sole judges, have jurisdiction over such offences as are cognizable by the County Sessions—whose powers, it may be mentioned, extend to all boroughs which may not have petitioned for a separate court under § 103 of the Municipal Corporation Act.

§ III. The LONDON SESSIONS, in consequence of the large population of the district of London, are held eight times a year: four, as Quarter Sessions, not exactly at the times mentioned in the statutes, but as nearly so as convenience will admit; and the remaining four as

* 3 Burn's Justice (29th ed.), p. 973.

original general sessions, in the intervening periods.* The exact times are fixed by the Court of Aldermen, for each year. The judge, presiding at these sessions, is the Recorder, who sits as the assessor of the Lord Mayor and Aldermen, and few other cases than those of misdemeanor are tried there. We have seen the extent to which the jurisdiction of these Sessions, and of those for the county of Middlesex, and for the adjoining counties, so far as they are tributary to the jurisdiction of the Central Criminal Court, mentioned in the statute creating that tribunal, has been diminished by that act. But by another statute (5 & 6 Vict. c. 38) passed in the year 1842, a far greater inroad has been made upon the criminal jurisdiction of both County and Borough Sessions. They are thereby prohibited from trying any treason, murder, or capital felony; any offence punishable with transportation for life; and a long catalogue of offences, specified in the act, such as misprision of treason, political offences, offences against religion, perjury, and subornation of perjury, bribery, forgery, bigamy, abduction, setting fire to growing crops, woods, heaths, &c., endeavouring to conceal the birth of a child, offences against the Insolvent and Bankrupt laws, administering unlawful oaths, blasphemous and seditious libels, conspiracies and combinations, stealing, injuring, or destroying legal records and documents, testamentary papers, and wills. The consequence of this enactment has, of course, been, very greatly to reduce the importance of the criminal business transacted in the Courts of Quarter Sessions.

IV. THE POLICE COURTS, in the metropolis, and most of the leading cities and towns in England.

* *Busby v. Watson*, 2 W. Blac. 1051.

Though the magistrate here has to decide only whether, in important cases, he will dismiss the case, or commit for trial, or admit to bail, and to exercise his extensive summary jurisdiction in minor offences, still as prisoners have now the right of being assisted on these occasions by counsel and attorneys,* it is obviously of importance to both, to be acquainted with the leading doctrines of the criminal law, of the law of evidence, and of the practical course of procedure on such occasions. There is frequently room for the exercise of great discretion on the part of counsel, or attorneys, when attending on behalf of persons charged with serious offences, and whose interests may be fearfully compromised, in that preliminary stage of the inquiry, by an advocate not thoroughly acquainted with the duties which he is often called upon to perform under circumstances of great suddenness, excitement, and public interest.

NOTE I.—Peers and Peeresses are tried by their Peers (*i. e.*, before the House of Lords, specially convened, under the name of “The Court of the Lord High Steward of Great Britain”) in cases of treason, felony, or misprision of either. The last trial of this kind was that of the Earl of Cardigan, in the year 1841, for fighting a duel;* and occasioned the passing of statute 4 & 5 Vict. c. 22, which, to obviate some doubts arising out of the language of the Act abolishing benefit of clergy, renders Peers of Parliament, convicted of felony, liable to the same punishment as commoners so convicted. In cases of misdemeanor, Peers are to

* This privilege is extended to the cases of the mother and putative father of bastard children, in applications to justices at petty sessions, under statutes 8 & 9 Vict. c. 10, § 7.

† The earl was acquitted.

be tried in like manner as commoners, *i.e.*, by a jury. See the case of the King v. Edward Lord Vaux, 1 Bulstrode, 197; and Mr. Justice Coleridge's Note (7) to 1 Bla. Com. 401.—II. The High Court of Parliament is the supreme Court for trying either peers or commoners, by *Impeachment*; and for finally adjudicating upon all substantial matters of criminal law, where error is apparent on the face of the Record, when brought before that court by Writ of Error. Except on this ground, the sentence of no criminal Court in England, from the highest to the lowest, can be controlled or reversed by even the highest jurisdiction (4 Bla. Com. 259).—III. In cases of misdemeanor, if the defendant be convicted, a new trial may be obtained—but not in the case of an acquittal. In felonies there can be no new trial in either event; and if the judge at the trial doubt as to the propriety of admitting or rejecting any evidence, or whether the facts proved constitute the crime charged, the course adopted is, either to respite the judgment, or forbear passing sentence until the opinion of the fifteen judges shall have been taken, on a “CASE RESERVED” by him for that purpose. When the objection is founded on the insufficiency of the *indictment*, the proper course is, as in civil cases, to demur, or move in arrest of judgment, or bring a writ of Error.*—IV. Let the student particularly observe that there is no difference between the rules of EVIDENCE, in civil, and in criminal, cases. Whatever may be received in the one case, may be received in the other: and what is rejected in the one, ought to be rejected in the other.† A fact must be established by the same evidence, whether it be followed by a

* *Regina v. Purchase*, 1 Carr & Marsham, 617; *Regina v. Overton*, *ibid.* 655.

† Per Lord Tenterden, in *Rex v. Watson*, 2 Stark. Rep. 155.

criminal or a civil consequence.* All these considerations demonstrate the paramount necessity and advantages of an *early* familiarity with the law of evidence. V.—With reference to criminal PLEADING. The difficulty lies in framing the indictment, or information; the only *plea*, except in comparatively rare cases, being the simple one of *Not Guilty*: but the framing of an indictment is often a matter of extreme difficulty, requiring a corresponding amount of skill and experience. It is too generally, however, supposed otherwise; and the consequences are often peculiarly vexatious and mischievous, with reference equally to the public, and the reputation of the erring draftsman. There is practically no limit to the number of counts which may be used in an indictment—in which respect the criminal pleader has a great advantage over the common-law pleader, who, as we have seen, is now restricted to one count and one plea in respect of the same cause of action or of defence. Till the House of Lords, in the case of *O'Connel v. the Queen* (A. D. 1844), laid down to the contrary, a single good count was held sufficient to sustain a general judgment, in spite of any number of bad counts. Now, however, the rule is reversed, and a single bad count will nullify the effect of fifty good ones. If this continue to be the law, the responsibility and labour of criminal draftsmen will be much augmented. Great pains must be taken in originally framing the counts; and much judgment exercised in selecting the count or counts on which to take the verdict and judgment: for the prisoner is entitled to an acquittal on all the counts abandoned by the prosecutor. If that selected by the crown should

* Lord Melville's case, 29 How. St. Tr. 763.

prove substantially insufficient, a writ of error will be brought; the judgment reversed; and, if any of the rejected counts could have been sustained by the evidence adduced at the trial, then the prisoner, though clearly guilty in point of fact, may plead his acquittal, and so escape altogether from punishment. The young practitioner at sessions is plunged *instantly* into the midst of these difficulties and dangers: his very first indictment, framed necessarily with little time for consideration, having to undergo the immediate ordeal of the trial. He is probably called upon at an hour's notice to frame an indictment in which there *must* be some nicety or difficulty, or counsel would not have been employed to frame it. VI.—Let us proceed to offer some brief practical observations on the advantages, disadvantages, and difficulties attending the selection of that avenue to business which is offered by SESSIONS PRACTICE. The tyro here has the opportunity of early learning how to address a jury, to examine witnesses, and—ininitely more difficult task—of cross-examining, and re-examining them. He has thus the means of acquiring, betimes, self-reliance, business habits, and the *use* of previously acquired knowledge. Even the youngest beginner is here the *leader*—or rather, has the sole management—of the case intrusted to him, and is responsible for its success. If a man have superior natural qualifications for the Bar, here he is afforded the readiest and safest opportunities of exhibiting them, and gradually gaining the confidence of those who will by and by intrust him with a higher class of business: and in this respect the young sessions' lawyer acquires great advantages over his special pleading rival; whom the living incarcerated in chambers, is apt to have incapacitated for encountering the

sudden and stirring exigencies of practice in open court. The latter, however, generally plays a safe and prudent game; for he acquires in chambers that learning, experience, and connection, which will generally secure him a respectable and lucrative business, as a *junior*, under the guidance of a leader, and—if he possess eloquence, tact, and readiness—urge him on soon towards the very highest point of professional distinction. Some of the brightest ornaments of the present Bench and Bar commenced their career at Sessions;* and undoubtedly that field is selected by the majority of the bar: most of whom, however, quit it as soon as it has afforded them a fair introduction to the general business of circuit. The chief danger to which he is exposed who commences his legal career with sessions, is that of losing sight of, and neglecting, other branches of legal learning—particularly pleading, and *Nisi Prius* law. His time and attention are so much occupied and absorbed with his frequent visits to sessions, and the necessity of keeping up with the current of sessions law, that he is apt, at length, to think of little else than that which gives him such frequent, and almost exclusive, employment. Another principal disadvantage is, that the sessions tyro has *no previous training* before being called to the bar, and entering into action. It is very rarely that he gives deliberate or adequate attention to the *study* of the criminal law; and of the *practice* of it he can rarely see anything, till after he has been called to the bar, and attended sessions. He generally plunges into sessions practice, immediately after having quitted the chambers of

* The late Lord Abinger and the present Justices Williams and Coltman, were successively *leaders* of the *same* sessions.

a conveyancer, or special pleader, or common law barrister.* The author would recommend one who has determined upon commencing with sessions, in preference to pleading, to spend a short time in the chambers of some experienced member of the criminal bar in London,—practising at the Central Criminal Court, or the London, Middlesex, and Surrey Sessions; and frequently accompanying him to Court. He should study with deep attention Mr. Starkie's masterly "TREATISE ON CRIMINAL PLEADING"—a small volume, containing fewer than four hundred pages. It is a most scientific, and, at the same time, practical exposition of *principles*. A new edition (the last was published in 1822) of this work, adapted to the existing state of the law, is a real *desideratum*; but the existing one is absolutely invaluable to the young criminal draftsman.† Next to this work, perhaps the first volume of Mr. Chitty's Treatise on the Criminal Law is best calculated for the purposes of the student; but the last edition of this work was published as long ago as 1826.—"PALBY ON CONVICTIONS" (the third edition, edited by the late Mr. Deacon, was published in 1838) is also a work worthy of the early attention of the student; being upon a subject of equal importance and difficulty, and one which

* At many sessions there prevails a practice, on the part of the clerks to the magistrates, or town clerks, of distributing a number of briefs, in the simplest cases, among the juniors. To these briefs, which are usually given to gentlemen on their very first appearance, the *soubriquet* of "soups" has been good-humouredly applied by the sessions bar: and they secure the tyro the earliest opportunity of "fleshing his maiden sword," and conducting a case in court. He never fails, on these occasions, to receive the friendly assistance of his brethren, in the event of his appearing embarrassed, and at a loss.

† There are two volumes of this work. The second consists of *precedents* only.

will soon require his exertions in practice.—The best general treatise on criminal law is “**RUSSELL ON CRIMES AND MISDEMEANORS**,” in two very large and bulky 8vo. volumes, containing upwards of 2000 pages. The last edition (the third), very ably edited by Mr. Greaves, of the Oxford Circuit, was published in 1843.—*Note.* This work contains nothing concerning the law of High Treason—a topic which, for the reason specified in the preface, was purposely excluded.—The student should carefully discriminate between books written purely for practical use, in business, and those of a scientific and elementary character. To the latter he should give his undivided attention, before he betakes himself to the former. He should familiarise himself with such portions of the fourth volume of Blackstone’s Commentaries, with Sir Matthew Hale’s, Mr. Serjeant Hawkins’, and Mr. East’s Pleas of the Crown, and Sir Michael Foster’s Four Discourses on Crown Law, as an experienced tutor or friend may point out to him. These are works of great authority with the Courts, and constantly cited in arguments on important criminal cases. “**Archbold’s Summary of Criminal Pleading and Evidence**,” edited by Mr. Jervis, and “**Roscoe’s Criminal Evidence**,” edited by Mr. Granger, are the usual *vade mecum*s of practitioners at the sessions and assizes; but are nothing more than conveniently condensed summaries of the law, calculated for instant reference; for which purpose they are excellently adapted, but utterly unfit, nor were they ever designed by their compilers, to communicate elementary knowledge to the student. That, as we have already intimated, he must first obtain elsewhere. A compact and convenient summary of the Criminal Law, adapted for sessions, by

Mr. Archbold, has just been published in three thick and closely-printed 12mo. volumes, entitled "The Justice of the Peace and Parish Officer," in which are incorporated the latest changes in the law, down to the close of the year 1844. But the leading work on this subject has long been "Burn's Justice," of which a new edition has just been published (1845), in six huge closely-printed 8vo. volumes, each containing about 1200 pages, edited by Mr. Commissioner Bere and Mr. Thomas Chitty, and including the cases and statutes down to the 7 & 8 Victoria, inclusive. The well-known industry, experience, and learning of the editors, are sufficient guarantees for the accuracy and ability with which their laborious task has been accomplished. But what havoc will not be made with these and all such works, by the contemplated criminal code! to say nothing of the incessant alterations in the POOR LAWS; in which still more sweeping changes than have been effected during the last five or six years, have been proposed by the Government during the present session (1845). Whatever, notwithstanding, may be the result of such alterations, it is difficult to imagine any which will supersede the necessity of the sessions lawyers' diligent study of the existing Poor Laws, and practical familiarity with the machinery by which they are worked. Even should the Government succeed in revolutionising the law of settlement, by reducing the present modes of acquiring a settlement to a single one, viz., by birth, as is proposed by the Bill now under the consideration of Parliament, or by breaking up the ancient parochial system, it is manifest, that for years to come, questions will be constantly arising under the laws which have been in force for so many years past. The student may rest assured

that the Poor Laws are at this moment, and will long continue to constitute, by far the most formidable of the difficulties which he will have to encounter in his early professional career. He should endeavour to master the great *principles* on which the system is founded—the objects which it proposes—in order to appreciate the scope and tendency of the innumerable minute and complex regulations, the technical difficulties arising out of which, constitute the occasions of litigation which are brought under his professional notice. He should ask himself continually during his studies, “What is the *reason* of all this pertinacious and expensive opposition to such and such an order of justices—for instance; what inconvenience is to be avoided, what good end to be attained?” and observe particularly how the discussion of these topics involves that of some of the most abstruse doctrines of general law—those apparently most remote from, and utterly unconnected with the subject. He should acquaint himself with the precise nature of the powers of a single justice—of justices in petty sessions—in special sessions—and general Quarter Sessions—how they ought to be exercised, and how, in what forms, and within what periods, they should be impugned, and appealed against. With these matters country attorneys are thoroughly familiar, and are not likely to consult one, in their difficulties, whom they perceive to know less on the subject than themselves. Every new Act of Parliament concerning the Poor Laws, should be instantly and most carefully studied by the young sessions lawyer; who ought, moreover, to be a constant attendant in the Court of Queen’s Bench, whenever Poor Law cases are discussed, and to peruse diligently the Reports of them. In the present unsettled and truly unsatisfactory state of this branch of the law, it is difficult

to recommend any works as safe guides to the student. The most scientific treatise ever published on the subject is that of the late Mr. Nolan ; but since the appearance of the last edition, such changes have been effected as render the perusal of that work by a student highly inexpedient ; except under the eye of a competent tutor. The volume of Burn's Justice devoted to this subject, and which is written by Commissioner Bere, is the most comprehensive and important work on the subject ; and that of Mr. Archbold, in his " Justice of the Peace," entitled " Poor," is distinguished by all that gentleman's brevity, accuracy of style, and excellence of arrangement : but neither of these works is adapted for a *first* book to the session's lawyer, and great portions of both of them, may be rendered obsolete by the threatened legislation of even the present session. It is to be feared that this important and difficult head of law will remain unsettled for years to come. All that students and practitioners can do, in the meanwhile, is promptly and thoroughly to master each Act of Parliament as it comes out ; compare it with its predecessors ; note the decisions on such previous statutes, and how they are affected by it ; vigilantly watch the working of it as soon as it comes into operation ; and study the decisions to which it may give rise. So much for the Poor Law branch of sessions' business. That of the general Criminal Law there administered, need not occupy more of our attention, than has already been expended upon the subject in the preceding pages.

There are certain peculiar dangers and disadvantages attending the practice at sessions, to which it is not expedient specifically to allude. We may, however, intimate generally, that it is calculated quickly to develope the

real nature of a man's character; to make manifest who is a gentleman, and who is not; who will resort to despicable modes of securing employment, and who, disdaining such unworthy courses, will maintain that dignified independence of character and straightforwardness of conduct, which will not fail of securing the cordial respect both of clients, brother counsel, and the bench, and which alone will lay the foundation of early and permanent success at the bar. A bad character contracted at sessions, is not easily to be got rid of at the bar: and the effect is speedily visible, when those who are unfortunate enough to be so distinguished, are brought into contact with the general body of the bar, on circuit, or in London.

While a general knowledge of Sessions Law is undoubtedly, in many points of view, of great importance to those members of the bar who have chosen the other avenue to practice (Pleading), the hint already offered (*ante*, p. 617) should be impressed upon those who commence with sessions, viz.—the necessity of keeping up their acquaintance with Pleading, and *Nisi Prius* Law. Sessions are to be regarded, except in some very few cases, solely as a stepping stone to general practice at the bar: but for that general practice its candidates will be utterly disqualified, if they shall have neglected to acquire, or to keep up, a knowledge of the rules of civil pleading, of evidence, of the practice of the courts, and the leading branches of the law,—as of Real Property, Mercantile Law, &c. &c. It remains to be added, that the practice on the Crown side of the Queen's Bench, is by no means confined to the practitioners at sessions: to whom, however, is principally intrusted that portion of it which consists of appeals from the decisions of the justices of the peace, particu-

larly in questions of Poor Law : but those of *Mandamus*, *Quo Warranto*, and Criminal Informations, Indictments for Misdemeanors and matters of a *quasi* civil nature, as the non-repair of roads, bridges, &c., are intrusted to the members of the bar generally. Nor is the criminal business of the assizes, *entirely* confined to the practitioners at sessions : for a considerable number of the cases in the Crown Court are intrusted to the junior, the more important to the *senior*, members of the civil court. Upon circuit, the young counsel should attend the sittings of each of the two courts, directing his attention closely to what is going on : otherwise he may as well save the expense of going circuit at all.

Such is an outline—the best which the author has been able to present—of the general nature of the administration of English Criminal Law, in all its branches, with a view to affording such practical information to the student, as may help him judiciously to determine upon his course in coming to the bar. While it affords the young advocate the earliest opportunity of displaying talent and eloquence in public, it is also attended with serious responsibilities, and several inconveniences and disadvantages. It is not, upon the whole, either a pleasant or lucrative species of practice, yet often leads to great results, and involves the possession of a species of professional knowledge which is indispensable to every member of the bar, be his talents, acquirements, connections, and opportunities what they may.—There is, by the way, no difference in rank whatever between the practitioners in the civil, and those in the criminal courts ; and each may derive advantages, on innumerable occasions, from the practical knowledge and assistance of the other.

NOTE.—As the course of criminal procedure in Scotland, varies much from that in England, the student will find in the Appendix, (No. IX.) a compendious account of it, abridged from a standard text-book of Scotch Law, and which it is to be hoped will be perused with interest.

In the Appendix, No. VIII., will be found a series of specimens of Indictments, Informations, the Writ of Certiorari, Procedendo, and Mandamus.

CHAPTER XIII.

DEPARTMENTS OF THE PROFESSION—
ECCLESIASTICAL DEPARTMENT.

THE task of describing this important but anomalous department of our legal system, is peculiarly difficult and disheartening: for no one can tell whether the existing fabric of ecclesiastical jurisdiction, notwithstanding some considerable alterations recently effected in it, may not undergo an entire reconstruction, even before the present work shall have quitted its author's hands. Evils and inconveniences are universally admitted to exist in the present administration of ecclesiastical law; but the difficulty of dealing with them, would seem to be almost invincible. The main feature of the measures (as we shall presently see more in detail) which have been proposed by Parliament only to be defeated, was the abolition of a great number of local ecclesiastical jurisdictions, and the transference of the principal business, hitherto transacted in them, to the Courts at Doctors' Commons, in London. To effect this object, which was recommended in 1831 by the eminent members* of the Commission which had been appointed by the Crown to inquire into the practice and jurisdiction of the ecclesiastical courts in Eng-

* The Archbishop of Canterbury, the Bishops of London, Durham, Lincoln, St. Asaph, and Exeter; Lords Tenterden and Wynford; Sir N. C. Tindal, Sir W. Alexander, Sir J. Nicholl, Sir C. Robinson, Sir H. Jenner, Sir C. E. Carrington, Dr. Lushington, and Mr. Cutler Fergusson. Many of them are now (1845) dead.

land and Wales, all the energies of successive governments, without regard to party, have been put into requisition, down to the year 1845, but in vain: and they have admitted that they could not withstand the strength of local interest arrayed against them. Another attempt has just been made (26th May, 1845) by Lord Cottenham, with the cordial assent of the Lord Chancellor (Lyndhurst) to carry into effect the recommendations of the Commissioners: but with what success remains to be seen. Whatever may be the result of these attempts, it may be as well to bear in mind an observation of Blackstone—that “the boundaries of the ecclesiastical tribunals, especially those of the superior kind, are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the ancient channel. *And should an alteration be attempted, great confusion would probably arise, in overturning long established forms, and new modelling a course of proceedings which has now prevailed for some centuries.*” * Under these circumstances, we shall content ourselves with a sketch of the existing system, principally relying upon the report of the above-mentioned Commissioners, as far as the machinery and practical details of that system are concerned; but indicating fully and distinctly the *principles* on which ecclesiastical law is based, for the purpose not only of giving information to those who may feel disposed to select that particular walk of the profession, but of demonstrating to those who may choose any of the other departments already reviewed, the necessity of acquiring correct general notions on the subject now under examination. The very peculiar position, in our municipal system, of the civil and

* 3 Bla. Com. 99.

canon law, as administered in the courts which we are now to consider, makes it equally incumbent on civilians and common lawyers, to become acquainted with each other's provinces. "Those gentlemen," says Blackstone,* "who intend to practise the civil and ecclesiastical laws, in the spiritual and maritime courts of this country, are, of all men, (next to common lawyers), the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom—and are no more binding in England, than our laws at Rome. But as far as these foreign laws, on account of some peculiar propriety, have, in some particular cases, and in some particular courts, been introduced, and allowed by our laws, so far they apply, and no further; their authority being wholly founded upon that permission and adoption. * * * * Wherefore, on all points in which the different systems depart from each other, the LAW OF THE LAND takes place of the law of Rome, whether ancient or modern, whether Imperial or Pontifical. And in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land—the common law, in either instance, both may, and frequently does; prohibit and annul their proceedings: and it will not be a sufficient excuse for them to tell the King's Courts at Westminster,

* 1 Bla. Com. pp. 14, *et seq.*

that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota, or imperial chamber. For this reason it becomes necessary for every civilian and canonist, who would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases, and how far, the English laws have given sanction to the Roman; in what points the latter are rejected; and when they are so intermixed and blended together, as to form certain supplemental parts of the common law of England, by the title of the King's Maritime, the King's Military, and the King's Ecclesiastical Law. The propriety of such an inquiry, the University of Oxford has, for more than a century, so thoroughly seen, that in her statutes she appoints that one of the three questions to be annually discussed at the Act, by the jurist-inceptors, shall relate to the common law—subjoining this reason:—"Quia juris civilis studiosos decet haud imperitos esse juri municipalis, et differentias exteri patrique juris rectas habere:" and the statutes of the University of Cambridge speak expressly to the same effect. "Doctor legum mox a doctoratu dabit operam legibus Angliæ, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patrique juris noscat."* Similar reasons may be assigned for requiring the common lawyer to be acquainted with the principles and general method of procedure in the ecclesiastical courts. How can he pronounce any particular act done by them to be an excess of jurisdiction, if he know not precisely the nature and extent of the action permitted to them by the common law? And there are certain con-

* Stat. Eliz. R. c. 14; Cowel, Instit. in Proëmio.

siderations of a practical kind, alluded to in the eighth chapter of this work, tending to the same result, and requiring an expert practitioner to exhibit a knowledge of all these rights which can be either exclusively, or, at all events, most beneficially enforced, in the ecclesiastical tribunals. It is true, however, that some of the latter reasons may be diminished in number, provided the contemplated change be carried into effect, with reference to the transfer of the ecclesiastical jurisdiction in tithe cases to the Court of Chancery, and the entire abolition of the *criminal* jurisdiction of the ecclesiastical courts.

The Ecclesiastical Law, says Dr. Burn,* is compounded of these four main ingredients, the *Civil* law, the *Canon* law, the *Common* law, and the *Statute* law. Where these laws do interfere with and cross each other, the order of preference is this: the Civil law submitteth to the *Canon* law: both of these to the *Common* law: and all the three to the *Statute* law. So that from any one or more of these, without all of them together, or from all three together without attending to their comparative obligation, it is not possible to exhibit any distinct prospect of the English Ecclesiastical Constitution.

It would be superfluous to enter into any detailed account of the constituent parts of the civil law; but it will be attempted to offer a brief and distinct indication of its principal features.—Its origin is to be traced to the period of abolishing the regal government at Rome, and substituting for it the Republic. Sixteen years after the expulsion of the kings, three learned Romans were sent into Greece to collect the laws of the Athenian

* 1 Burn. Eccles. Law, Pref. p. xi.

and other Grecian States : and out of the product of their researches, ten Commissioners (the Decemviri) compiled and digested the body of laws known by the name of the Laws of the *Twelve Tables*, (so called from their being engraved on twelve tables of brass,) and which constituted the first and principal foundation of the Roman Law. The first stage of the civil law was that under the Republic: consisting of the *Responsa prudentum* or Interpretation of the Lawyers, contradistinguished from the written law of the Twelve Tables by the name of 'jus non scriptum,' or unwritten law,* and having no other name, it began to be called the *Civil* law. Justinian styles it the *jurisprudentia media*—because it intervened between the laws of the Twelve Tables, and the Imperial Constitutions. Then came the '*Leges*,'† emphatically so called, because enacted by the whole body of the people, the nobility and commonalty; and then the *plebiscita*, which were laws enacted by the common people, during the period of their retirement and secession from the nobility; and afterwards, on a reconciliation being effected, it was agreed that these *plebiscita* should be incorporated into the general body of the law. Afterwards came the *Senatus consulta*, or decrees of the Senate, which was intrusted with that power, in order to avoid the serious evils and inconveniences of assembling together frequently the whole body of the people. The Prætorian Edicts came next: being those which were issued by the two Prætors created by the people to govern them during the absence of the consuls, in foreign wars. These edicts, having first been approved by the people, were incorporated with the civil law, by the name of *Jus prætorium*.

* *Vide ante*, pp. 402, 3.

† 1 Burn, Pref. p. xiv.

The *perpetual* edicts were then established—in the first instance, annually, by the *Ædiles Curules*, but afterwards were, by the Cornelian Law, made perpetual.—Such were the ingredients of the civil law during the Roman Republic. After the government had been transferred into the hands of the Emperor, two other branches were added, viz. the *Constitutiones principum*, (Imperial Constitutions) and *Responsa prudentum* (Answers of the lawyers) : but these latter were widely different from the *responsa prudentum* under the Republic. The latter were delivered without the sanction of public authority, and formed only, as already explained, *jus non scriptum* : but the former were answers delivered concerning the law by those who alone were allowed to do so by the Emperors, who gave them a special commission for that purpose. These answers constituted portions of the *jus scriptum* (written law), and the judges were bound to conform to them. The Imperial Constitutions were the enactments of the Emperors, after the Lex Regia had granted the administration to Augustus ; and consisted of such matters as the Emperor had ordained by his epistle, or commanded by his edict or proclamation, or decreed by him when sitting in judgment. During the five hundred years which elapsed from the time of Augustus to Justinian, the civil law had swollen to so vast a bulk, that at three different periods as many *Codes* of the Imperial Constitution were produced, known after the names of their respective makers, as the *Gregorian*, the *Hermogenian*, and the *Theodosian* Codes. In these three codes, however, there appeared so much redundancy, confusion, and inconsistency, that the Emperor Justinian, in A. D. 528, decided upon the grand undertaking of a complete revisal and correction of the law. Out of these

three codes of the Imperial Constitutions, and also out of the new Constitutions promulgated subsequently to the compilation of the Theodosian Code, he caused a new one to be compiled; which is extant at this day, under the name of the JUSTINIAN CODE. His next step was to abridge and digest the many hundred volumes which contained the authoritative answers or decisions of the Roman lawyers, on questions and cases which had been proposed to them (*Responsa Prudentum*). This undertaking he called the DIGEST, or PANDECT. From this Digest, from the Justinian Code, and other commentaries of the ancient lawyers, he then caused the *elements* of the Roman law to be collected and condensed into the "Institutes," in four books; which constituted an Abridgment, for the use of students,* and must have been admirably adapted for its object; being brief, well arranged, and written with the utmost purity and elegance of style. After the final completion of his Code, of which he published a new and revised edition, (entitled *Codex repetitæ prælectionis*), ordering the former one to be suppressed, he enacted, from time to time, various new Constitutions or 'Novels' (*Novellæ Constitutiones*)† and also thirteen *Edicts*, which, being collected after his decease, became a fourth part of the Civil Law. Thus the entire body of the Civil Law (*CORPUS JURIS CIVILIS*) in use at this day, consists of these four books—The CODE; the DIGEST; the INSTITUTE; and the NOVELS. By this civil law was governed the greater part of Britain, for the space of about three hundred and sixty years (from

* *Vide ante*, pp. 84, 5.

† Also called "*Authenticæ*," to distinguish them from some Constitution of succeeding emperors, which were not regarded as of much authority.

Claudius to Honorius): during which period some of the greatest masters of that law, whose Opinions appear collected in the body of it,—as Papinian, Paulus, and Ulpian, —sate in the seat of judgment, in this island. We have already spoken elsewhere of the manifold traces still visible of the ancient supremacy of that law.* After the declension of the Roman Empire, the Saxon, Danish, and Norman Laws superseded a great portion of the Roman law ; but not very long afterwards, it began again to manifest its influence, and entered largely into the composition of the common law,† as is sufficiently evidenced by the extant writings of our great common law writers, especially Bracton and Fleta. Under the influence of the foreign ecclesiastics who, pouring into this country after the conquest, long monopolised the administration of the law, great encouragement was given to the adoption of the civil law ; till the nobility and laity became so jealous of its prosperity, and alarmed at its progress, that a long and fierce feud ensued between the laity, stoutly struggling for the common law, and the clergy, for the civil and canon law ; to which, in the end, they entirely betook themselves ; and, withdrawing from the temporal courts, left them to the superintendence of the common lawyers : still, however, keeping an ecclesiastic at the head of affairs, in the high office of Chancellor ; who, as his office gradually increased in influence and power, was enabled, in time, to introduce much of the spirit of the civil law into the administration of municipal law, especially in the courts of equity.—The CANON Law is founded principally upon the Civil Law ; and, says Dr. Burn,‡ so inter-

* *Ante*, pp. 245, *et seq.* ; 409, *et seq.*

† *Ib.*

‡ 1 *Eccles. Law*, Pref. p. xviii.

woven with it in many branches thereof, that there is no understanding the canon law rightly, without being very well versed in the civil law:—wherefore the knowledge thereof is absolutely necessary for the dispatch of all causes of ecclesiastical cognizance. And the civil law not only serves to explain the *canon* law, but by the practice of all ecclesiastical courts, is allowed to come in aid of and to support the canon law, in cases which are there omitted. The canon law sprung up out of the ruins of the Roman Empire, and from the power of the Roman pontiffs. The following is the lucid account of its origin and character, given by the Ecclesiastical Commissioners in their very able Report in the year 1832.

The Ecclesiastical laws of this country have been for the most part derived originally from the authority exercised by the Roman pontiffs, in the different states and kingdoms of Europe.

Spelman mentions the adoption of the decrees and canons of the church of Rome, as they then existed, by the clergy and people of England, so early as the year 605, soon after the establishment of Christianity in this country; and there were ecclesiastical councils in England, and canons passed therein, before the Conquest.

From the middle of the twelfth century, a system of laws, under the influence of successive Popes, has been compiled and promulgated at different periods. This system has been generally diffused throughout Europe, and prevails with more or less authority in different countries, under the title of the *Canon Law*.

About the year 1150, that part which is called the *Decretum*, was collected by Gratian, the monk, out of the fathers, doctors, and councils.

In the next century, Pope Gregory IX. published five books of *Decretals*, collected from the Decretal Epistles of the Popes; to which Boniface VIII. added a sixth book, about the end of the same century. The *Clementine Constitutions* were next compiled by Clement V., and published by his successor John XXI., at Avignon in 1317, who afterwards collected some further Constitutions, which were published after his death, about the year 1340.

A seventh book of *Decretals*, and a book of *Institutes*, were added by Gregory XIII., under whose sanction the *Corpus Juris Canonici*, containing all the above several parts, was published in 1580.

‘The Pontifical Law so promulgated,’ says an eminent writer on the law of Scotland (Lord Stair), ‘extended to all persons and things belonging to the Roman Church, and separate from the laity; to all things relating to pious uses; to the guardianship of orphans, the wills of defuncts, and matters of marriage and divorce; all which were exempted from the civil authority of the sovereigns, who were devoted to the see of Rome. So deeply has this law been rooted, that even where the Pope’s authority has been rejected, yet consideration has been had to these laws, not only as those by which church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected.’*

In England, however, the authority of the Canon Law was at all times much restricted; being considered, in many

* *Institutes of the Law of Scot.*, lib. i. tit. 1, § 7. See also 1 Bla. Com. 83.

points, repugnant to the law of England, or incompatible with the jurisdiction of the Courts of Common Law. So much of it as has been received, having obtained by virtual adoption, has been for many centuries accommodated by our own lawyers to the local habits and customs of the country; and the Ecclesiastical Laws may now be described, in the language of our statutes, as 'laws which the people have taken at their free liberty, by their own consent, to be used amongst them, and not as laws of any foreign prince, potentate, or prelate.'*

In addition to these authorities of *foreign origin*, must be enumerated also the *Constitutions* passed in this country by the Pope's legates, Otho and Othobon, and the archbishops and bishops of England assembled in national councils in 1237 and 1269, and a further body of *Constitutions* framed in provincial synods, under the authority of successive archbishops of Canterbury, from Stephen Langton in 1222, to Henry Chichester in 1414, and adopted also by the province of York, in the reign of Henry VI. or Edward IV.

These *English Constitutions*, as they may be termed, have been illustrated by the commentaries of English canonists of distinguished learning and experience, and principally by Lyndwood, an eminent canonist and statesman, much employed in the public affairs of the country in the reigns of Henry V. and VI. These Commentaries will be found to contain much valuable information on subjects connected with the history and government of the church.

* 25 Hen. VIII. c. 21, Preamble.

To the foregoing enumeration must be added, also, the canons of the English Protestant Church, passed in convocation in 1603; and such Acts of Parliament as make particular matters the subject of ecclesiastical cognizance, or regulate the course of proceedings with respect to them.

Such is generally the nature of the Civil and Canon laws guiding "those eccentrical tribunals," as Blackstone styles them, the Ecclesiastical Courts; which, as they subsist and are admitted in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, so must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, and what causes are permitted and what forbidden to be discussed and drawn in question before them. The Civil and Canon laws are of no more *intrinsic* authority here, than those of Solon and Lycurgus: their sole efficacy arising out of the circumstance of their having been, in particular cases, and some few Courts, introduced by consent of Parliament (then constituting a part of the *Lex Scripta*), or by immemorial usage and custom—(then a part of the *Lex non Scripta*). This matter is set upon its right foundation in the following remarkable declaration (addressed to the King's Royal Majesty) contained in statute 25 Hen. VIII., c. 21:—

"This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within this realm* for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your

realm have taken at their free liberty, by their own consent, to be used amongst them ; and have bound themselves by long use and custom, to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate ; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom ; and none otherwise."

So much for the origin and character of the Ecclesiastical law of this country. Let us now proceed to describe the tribunals by which it was administered in the year 1832. This will enable us afterwards to point out, conveniently and satisfactorily, the changes which have been effected since that time, and those which have been proposed, but hitherto unsuccessfully.—In the year 1832, the ordinary ECCLESIASTICAL COURTS were (and continue to be), I. The ARCHIEPISCOPAL, or PROVINCIAL COURTS—so called from the two great *provinces* into which this country (for ecclesiastical purposes) is divided,—viz., the province of Canterbury, and that of York. The province of Canterbury contains first the *Court of Arches*—the Supreme Court of Appeal for the province ; and it derives its name (*Curia de Arcubus*) from the church in London, called St. Mary *le Bow*, where the Court was formerly held : the church being so named from the steeple, which is raised by pillars, built arch-wise, like so many bent *bows*. Secondly, the *Prerogative* (or Testamentary) Court ; and, thirdly, the Court of *Peculiars*. The province of York contains two Provincial Courts—the *Prerogative* (or Testamentary) Court, and the Chancery Court. II. The DIOCESAN COURTS—being the Consistorial Courts of each diocese, exercising general jurisdiction. III. The Court or Courts of one or more

COMMISSARIES appointed by the bishop in certain dioceses, to exercise general jurisdiction within prescribed limits.

IV. The Court or Courts of one or more ARCHDEACONS, or their officials, exercising general or limited jurisdiction, according to the terms of their patents, or to local customs.

V. PECULIARS of various descriptions, in most dioceses; and in some they are very numerous—Royal, Archiepiscopal, Episcopal, Deaconal, Sub-deaconal, Prebendal, Rectorial, Vicarial, and Manorial Courts.

I. The ARCHIEPISCOPAL (*i. e.*, provincial) Courts of the two provinces of Canterbury and York, are quite independent of each other; and till very recently, an appeal from each lay to the King, who issued a Commission under the Great Seal, in each individual case of appeal, to certain persons called "DELEGATES," to hear and decide the case.—Of the three principal Archiepiscopal Courts of Canterbury, (1.) The *Arches* Court is the first and greatest: exercising appellate jurisdiction from each of the *Diocesan*, and most of the *Peculiar*, Courts within the province. It also takes cognizance of original causes by Letter of Request from each of these Courts, and has original jurisdiction in *Subtraction of Legacy* given by Wills proved in the Prerogative Court of Canterbury. (2.) The *Prerogative* Court has jurisdiction over all Wills and Administrations of personal property left by persons having *bona notabilia* (*i. e.*, effects of a certain value) in several jurisdictions within the province. A very large proportion—not less than four-fifths of the whole *contested* business, and a very much larger portion of the uncontested, (or "*common form* business"), is dispatched

by this Court. Its authority is necessary to the administration of the effects of all persons dying possessed of personal property to the specified amount within the province, whether testate or intestate; and from the vast increase of personal property, arising from the public funds and the extension of the commercial capital of the country, the business of their jurisdiction, both as deciding upon all the contested rights, and as registering all instruments and proofs in respect of the succession to such property, is become of the highest public importance.

(3.) The *Court of Peculiars*, the third Archiepiscopal Court of Canterbury, takes cognizance of all matters arising in certain *Deaneries*: one of which is in the diocese of London—another in that of Rochester—another in that of Winchester (each comprising several parishes); and some others, in which the Archbishop exercises ordinary jurisdiction, and which are exempt from, and independent of, the bishopric of the diocese in which such deaneries are locally situate; the deans holding independent courts within their respective deaneries.

The province of Canterbury contains twenty-two dioceses; and therein the diocese of Canterbury itself, where the ordinary episcopal jurisdiction is exercised by a Commissary, in the same manner as in other dioceses. The province of York includes four dioceses (York, Carlisle, Chester, and Durham), besides that of Sodor and Man; and the archiepiscopal jurisdiction is exercised similarly to that of Canterbury.

II. The DIOCESAN COURTS take cognizance of all matters arising locally within their respective limits, with the exception of places subject to *peculiar* juris-

diction: deciding all matters of spiritual discipline—suspending or depriving clergymen—declaring marriages void—pronouncing sentence of divorces *à mens et thoro*—trying the right of succession to personal property—and administering the other branches of ecclesiastical law.

III. The ARCHDEACONS' COURT is generally subordinate, with an appeal to the bishops' courts; though, in some instances, it is independent and co-ordinate.

IV. The PECULIARS, together with the Archdeacons' Courts, in some instances, take cognizance of all ecclesiastical matters arising within their own limits, though the jurisdiction of many of the peculiar courts extends to only a single parish: the authority of some of them is limited to a part only of the matters usually the subject of ecclesiastical cognizance; and several of the peculiars possess voluntary, but not contentious, jurisdiction. These *peculiar* jurisdictions amount in number to nearly 300; the entire number of the courts exercising every species of ecclesiastical jurisdiction, being 372; and we may observe in passing, that it is the threatened abolition of these numerous local tribunals, which has been the occasion of such fierce and repeated contests in parliament.

The matters of existing ecclesiastical jurisdiction may be reduced to three classes. *First*, Causes of a CIVIL and temporal nature, comprising *testamentary* causes; *matrimonial* causes for separation, and for nullity of marriage, which are questions of purely *civil* right between individuals in their lay character, neither spiritual, nor affecting the church establishment. *Secondly*, Causes of a MIXED kind, partaking of both a *spiritual and civil nature*; as suits for tithes, church rates, seats, and faculties. *Thirdly*, Causes PURELY SPIRITUAL, including church discipline,

and the correction of offences of a spiritual kind. They are proceeded upon in the way of *criminal suits*, *pro salute anime*, and for the lawful correction of manners. Among these are offences committed by the clergy themselves—such as neglect of duty, immoral conduct, advancing doctrines not conformable to the articles of the church, suffering dilapidations, and the like offences. Also by *laymen*; such as brawling, laying violent hands upon persons, and being guilty of other irreverent conduct in the church or churchyard; neglecting to repair ecclesiastical buildings, incest, incontinence, defamation. All these are called “Causes of Correction,” with the exception of defamation, which is of an anomalous character. These offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesie*, suspension from office, and deprivation. Such is a general statement of the matters of present ecclesiastical jurisdiction. Let us now proceed shortly to explain the constitution of the provincial courts of Canterbury—the judges, advocates, and proctors at Doctors’ Commons, and the course of general procedure there.

The ecclesiastical laws, as now existing, have been for upwards of three centuries administered, in the principal courts, by a body of men associated, as a distinct profession, for the practice of the civil and canon laws.

Some of the members of this body, in the year 1567, purchased the site upon which Doctors’ Commons now stands; on which, at their own expense, they erected houses for the residence of the judges and advocates, and proper buildings for holding the Ecclesiastical and Admiralty Courts; and there they have ever since continued to be held. In the year 1768, a royal charter was obtained, by virtue of which the members of the society, and their

successors, were incorporated, under the name and title of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts."

This college consists of a president (the Dean of the Arches for the time being) and of those Doctors of Law who, having regularly taken that degree in either of the Universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the Archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

From this brief account of the origin, and present constitution, of the College of Doctors of Law, it will be seen that no person can be admitted a member, or allowed to practise as an advocate in the Courts at Doctors' Commons, without having first taken the degree of Doctor of Laws in one of the English universities.

According to the present rules of these Courts, a candidate for admission, as an advocate, is required to deliver, into the office of the vicar-general of the province of Canterbury, a certificate of his having taken the degree of Doctor of Laws, signed by the registrar of the university to which he belongs. A petition, praying that in consideration of such qualification the candidate may be admitted an advocate, is then presented to the archbishop, who issues his *fiat* for the admission of the applicant, directed to his vicar-general; who thereupon causes a rescript or commission to be prepared, addressed to the Dean of the Arches, empowering and requiring him to admit the candidate as an advocate of that Court. To this a proviso is always added, "that the person to be admitted shall not practise for one whole year from the date of his admission," in order that, by attending during that interval, he may acquire a

competent knowledge of the form of the proceedings in those Courts.

On the day appointed for the admission, which is always one of the four regular sessions in each term of the Arches Court, the candidate is presented, by the two senior advocates, to the dean, who directs the archbishop's rescript to be read, and the oaths to be administered; which being done, he is admitted into the number of advocates, according to the tenor of the rescript. This admission qualifies the person for practising in any of the other ecclesiastical courts at Doctors' Commons; and for admission to be advocates in the High Court of Admiralty, on alleging their admission into the Arches Court.*

From the College of Advocates, who in the year 1844, were twenty-four in number, the archbishop has always selected the judges of the Archiepiscopal Courts.

Proctors in these Courts discharge duties similar to those of solicitors and attorneys in other courts.†

In order to entitle a person to be admitted a proctor, to practise in the Court of Arches, it is required that he shall have served a clerkship of seven years, under articles, with one of the thirty-four senior proctors, who must be of five years' standing; and who, by the rules of the Court, is prohibited from taking a second clerk, until the first shall have served five years; except in the event of the death of a proctor, to whom a clerk may have been articulated, before the completion of his clerkship. In this case any other of the thirty-four senior proctors may take such clerk for the remainder of the term, although he himself

* Parliamentary Return, 14th May, 1844.

† But they appear in Court in black stuff gowns: the advocates wearing wigs, bands, and black silk gowns, exchanged, on certain days, for scarlet cloth gowns.

may at the same time have a clerk of less than five years' standing. Before a clerk is permitted to be articled, he is required to produce a certificate of his having made reasonable progress in classical education.

When the term of seven years is completed, the party is admitted a notary, by a faculty from the Archbishop of Canterbury; a petition is then presented to his grace, accompanied by a certificate, signed by three advocates and three proctors, that the party applying to be admitted has served, as articled clerk to a proctor of the Court, for the full term of seven years. If this certificate be approved, the archbishop issues his *fiat*, and a commission is directed to the Dean of the Arches, by whom the party is admitted under the title of a supernumerary, with similar ceremonies to those observed on the admission of an advocate.

The proctor so admitted is qualified to commence business upon his own account immediately, but he is not entitled to take an articled clerk, until he shall have been for five years within the number of the thirty-four senior proctors.

The mode of commencing the *suit* and bringing the parties before the Court is by a process called a *citation*, or summons, containing the name of the judge, the plaintiff and the defendant, the cause of action, and the time and place of appearance. This citation, in ordinary cases, is obtained as a matter of course from the registry of the Court, and under its seal; but in special cases, the facts are alleged in what is termed an *act of Court*, and upon those facts the judge or his surrogate *decrees* the party to be cited; to which, in certain cases, is added an *intimation*, that if the party do not appear, or appearing do not show

cause to the contrary, the prayer of the plaintiff, set forth in the *decree*, will be granted.

The party cited may appear either in person, or by his *proctor*, who is appointed by an instrument, under hand and seal, termed a *proxy*. The proctor thus appointed represents the party, acts for him and manages the cause, and binds him by his acts.

The mode of *enforcing* all process, in case of disobedience, is by pronouncing the party cited to be *contumacious*; and if the disobedience continue, a *significavit* issues, upon which an *attachment* from Chancery is obtained, to imprison the party till he obeys. Sometimes, too, the recusant party is not allowed to proceed till he has obeyed the order of the Court; or the case is taken *pro confesso* against him.

The pleadings are intended to contain a statement of the facts relied upon, and proposed to be proved, by each party in the suit, the real grounds of the action, and of the defence.

Causes, in their quality, are technically classed and described, as *plenary* and *summary*, though in modern practice there is substantially but little difference in the mode of proceeding. All causes in the Prerogative Court, are *summary*; so were the proceedings in appeals before the High Court of Delegates, whatever might have been the character of the delegates, whatever be the character of the original causes; but other causes, whether of a criminal or civil nature, are *plenary*.

The first *plea* bears different names, in the different descriptions of causes. In criminal proceedings, the first plea is termed *the articles*; in form, it runs in the name of the judge, who '*articles*' and '*objects*' the facts charged against the defendant: in plenary causes, not criminal, the first plea is termed *the libel*, and runs in the name of

the party or his proctor, who *alleges* and *propounds* the facts founding the demand; in testamentary causes, the first plea is termed *an allegation*.

Every subsequent plea, in all causes, whether responsive or rejoining, and by whatever party given, is termed *an allegation*.

Each of these pleas contains a statement of the facts upon which the party founds his demand for relief, or his defence; resembling the bill and answer in Equity, except that the allegation is broken into separate positions or *articles*: the facts are alleged under separate heads, according to the subject-matter, or the order of time in which they have occurred.* Under this form of pleading, the witnesses are *produced* and examined only to particular *articles* of the *allegation*, containing the facts within their knowledge; a notice or *designation* of the witnesses being delivered to the adverse party, who is thereby distinctly apprised of the points to which he should address his cross-examination of each witness, as well as the matters which it may be necessary for him to contradict or explain by counter-pleading.

Before a plea of any kind, whether articles, libel, or allegation, is admitted, it is open to the adverse party to *object* to its admission, either in the whole or in part; in the whole, when the facts altogether, if taken to be true, will not entitle the party giving the plea to the demand which he makes, or to support the defence which he sets up; in part, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

* See several specimens of ecclesiastical pleadings in the Appendix (No. X.).

These *objections* are made and argued before the judge, and decided upon by him; and his decision may be appealed from. For the purpose of the argument, all the facts capable of proof are assumed to be true: they are, however, so assumed, merely for the argument, but are not so admitted in the cause; for the party who offers the plea, is no less bound afterwards to prove the facts; and the party who objects to the plea, is no less at liberty afterwards to contradict the facts. This proceeding is attended with great convenience in abridging the introduction of unnecessary and improper matter, to which parties themselves are generally too much disposed. They are apt to consider trivial circumstances to be important, and desire them to be inserted in the plea; a desire which neither the honest reluctance of the practitioners, nor the judicious advice of counsel, is always able to counteract: even the authority and vigilance of the Court itself cannot altogether prevent redundant pleading, and can check it only by taking it into consideration on the question of costs.

These proceedings have also the convenience of enabling parties, in many instances, to take the opinion of the Court in a very summary way, particularly in amicable suits: if the facts are candidly stated, and the Court, upon the plea being objected to, should be of opinion, that if proved, the facts either will or will not support the prayer of the plea; in the one case, if the plea be admitted, the further opposition may be withdrawn; in the other case, if the plea be rejected, the party offering it either abandons the suit, or appeals in order to take the judgment of a superior tribunal. This course saves the expense and delay consequent upon proving the facts by witnesses, in cases where there exists no doubt of the facts being

correctly alleged in pleas, and where the question between the parties is principally or perhaps altogether a question of law arising out of the facts so stated in the plea.

When a plea has been admitted, a time, or *term probatory*, is assigned to the party who gives the plea, to examine his witnesses ; and the adverse party is assigned, except in criminal matters, to give in his *answers* upon oath, to his knowledge or belief of the facts alleged.

The defendant may proceed then, if he think proper, or wait until the plaintiff shall have examined his witnesses, to give an *allegation* controverting his adversary's plea. This *responsive allegation* is proceeded upon in the same manner ; objections to its admissibility may be taken, answers upon oath be required, and witnesses examined.

The plaintiff may, in like manner, reply by a further allegation ; and on that, or any subsequent allegation, the same course is pursued.

The *pleadings* thus bring forward all the facts intended to be relied upon and proved on each side, and no surprise can well take place.

The next proceeding is the mode of taking *Evidence*.

The *witnesses* are either brought to London to be examined, or if they reside at a great distance or be otherwise unable to attend, they are examined by *commission*, near their places of residence. Their attendance is required by a *compulsory*, somewhat in the nature of a subpoena, obedience to which is enforced in the same way as in other cases of contumacy.

The *depositions* are taken in private by *examiners* of the court, employed for that purpose by the registrars. The examination does not take place upon written interrogatories previously prepared and known ; but the allegation

is delivered to the examiner, who, after making himself master of all the facts pleaded, examines the witnesses by questions which he frames at the time, so as to obtain, upon each article of the allegation separately, the truth and the whole truth, as far as he possibly can, respecting such of the circumstances alleged as are within the knowledge of each witness.

The *cross-examination* is conducted by *interrogatories* addressed to the adverse witnesses, and when the *deposition* is complete, the witness is examined upon the interrogatories delivered to the examiner by the adverse proctor, but not disclosed to the witness till after the examination in chief is concluded and signed, nor to the party producing him, till publication passes; and each witness is enjoined not to disclose the interrogatories, nor any part of his evidence till after publication. In order that the party addressing the interrogatories may be the better prepared, the proctor producing the witness delivers, as before stated, a *designation*, or notice, of the articles of the plea on which it is intended to examine each witness produced.

The *examination and cross-examination of witnesses* is kept secret until *publication* passes, after which either party is allowed to *except* to the credit of any witness, upon matter contained in his deposition. The exception must be confined to such matter, and not made to general character, for that must be pleaded before publication; nor can the exception refer to matter before pleaded, for that should be contradicted also before publication. The exception must also tend to show that the witness has deposed falsely and corruptly. These *exceptive allegations* are proceeded upon, when admitted, in the same manner

as other pleas. They are not frequently offered, and are always received with great caution and strictness, as they tend more commonly to protract the suit and to increase expense than to afford substantial information in the cause.

It is always, however, in the power of the court to allow further pleading in a cause; and if new circumstances of importance are unexpectedly brought out by the interrogatories, the court will, in the exercise of its discretion, allow a further plea after publication. This may also be permitted in cases where facts have either occurred, or come to the knowledge of the party, subsequently to publication having passed.

The evidence on both sides being published, the cause is set down for *Hearing*.

All the *papers*, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel.

All causes are heard publicly, in open court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signify that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

The *Judgment* of the court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open court, assigns

the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged.

Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the courts of Westminster Hall; but for the last twenty-seven years the judgments of these courts have been regularly reported.* These reports are not only useful in the jurisdiction itself, and the inferior courts, but they also serve to explain to the temporal courts the principles of ecclesiastical decisions, so as to enable them to form a more correct judgment of the proceedings, when they may have occasion to refer to them.

The *execution of the sentence*, in case there be no appeal interposed, is either completed by the court itself—such as by granting probate or administration, or signing a sentence of separation—or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which cases *execution* is enforced by the compulsory process of *contumacy*, *significavit* and *attachment*.

The question of *Costs* in these courts is, for the most part, a matter in the discretion of the judge, according to the nature and justice of the case: and the reasons for granting or refusing costs are publicly expressed at the time of giving the judgment.

The payment of the costs thus taxed as between *party*

* The first volume of Reports of Ecclesiastical Cases was that published by Dr. Phillimore in the year 1818, but commencing in 1809.

and party, is enforced by the process of *contumacy*, *significavit* and *attachment*: but the costs incurred by a party in a cause, and due to his own proctor, cannot be taxed by the judge, nor the payment thereof be enforced by the court; the proctor must recover his bill of costs against his client, by an action at law.

From the Archbishop's Court, as was before stated, *an appeal* lay to the Queen, by petition to the Lord Chancellor; who issued a *commission* under the Great Seal to certain persons, appointed thereby to hear and determine the cause in which the decree complained of had been made.

In ordinary cases, the *delegates* were three of the puisne judges, one from each court, and three or more civilians; but in special cases a fuller commission was sometimes issued, consisting of spiritual and temporal peers, judges of the common law, and civilians, usually three of each.

From the decision of the *delegates*, no further appeal lay as "matter of right;" but the unsuccessful party might have presented a petition to the Queen in council for a *commission of review*. This petition was referred to the Lord Chancellor, who, after hearing counsel on both sides, advised her Majesty thereon.

The advocates of the provincial courts at York, must be barristers at law; and they are admitted as advocates of the Consistory Court there, with power to practise in all the other courts of the Archbishop of York; the stamp duty on their admission being 50*l.* They are not required to be Doctors of Civil Law. The number of these advocates has never exceeded four—there being at present only two, who practise also both at sessions and at the assizes.*

* Parl. Paper, 14th May, 1844.

The advocates and proctors of the Court of Arches are entitled, as we have seen, to practise in the other Ecclesiastical Courts; and in the High Court of Admiralty, upon being admitted by the judge of it. This connection between the Ecclesiastical and the Admiralty jurisdictions has long subsisted, and probably owes its origin to the similarity of the form of proceedings in both courts, and of the course of study necessary to qualify the practitioners for the proper discharge of the duties entrusted to them. The study of the ecclesiastical law requires an accurate acquaintance with the principles of the *civil law*, upon which the law of the Admiralty is founded; and the civilian is led to the investigation of those principles of general jurisprudence by which the intercourse of nations is governed, and the rights and obligations of belligerents and neutrals in time of war are defined.

Such is an outline of the system of ecclesiastical administration in existence in the years 1829—1831, and which the Commissioners before alluded to were called upon thoroughly to investigate, and report what changes were deemed advisable. They commenced their labours in April, 1830; and at the close of January, 1831, presented an elaborate Report, in which they recommended an entire reconstruction of the system. Some of their most important suggestions have been carried into effect; but many others remain yet unaccomplished. Among the latter (and others subsequently proposed in Parliament), are the abolition of the whole of the contentious and voluntary jurisdiction of the Peculiars, and Manorial, and Diocesan Courts, and the transference of their testamentary and matrimonial business to the Arches Court at Doctors' Commons; the union of the Archbishop's Courts in

each of the two provinces of Canterbury, and York; the abolition of the whole criminal jurisdiction of the Ecclesiastical Courts; and the transference of that respecting church-rates to the Courts of Quarter Session, and of tithes to the Court of Chancery. These proposals have hitherto encountered a most formidable and successful opposition, mainly based upon—the needless centralization of the ecclesiastical jurisdiction in London; the inconvenience and expense attending the transference thither of the entire testamentary business of the country; and the absorption, by the practitioners in the central Metropolitan Court, of all the emoluments which for ages have fallen to the lot of the practitioners in the local Courts. Which of the antagonist forces will be ultimately successful, it is impossible to predict; and we do not feel called upon to offer any opinion as to the propriety or impropriety of the meditated changes in question. Another of the alterations proposed by the Commissioners, but not hitherto carried into effect, was that which had for its object to abridge the length of time which must at present elapse before advocates can commence practice, viz., till the age of 27 or 28 years; before which the degree of Doctor of Laws cannot be obtained. They proposed* that all who had taken the degree of Master of Arts or Bachelor of Laws, should be qualified to be admitted as an advocate, in the same manner, and under the same conditions and restrictions, as those under which persons are now qualified to be advocates: having first registered their names, on a proper stamp, in the Registry of the Court of Arches, as students, and intended candidates for admission as

* Eccles. C. Rep. p. 65.

advocates, one year before the application : with this proviso, that all persons having taken the degree of Doctor of Laws, should have precedence and pre-audience over those who should not have done so. The Commissioners "saw no reason to disturb the existing practice with respect to the admission of proctors." Let us now, however, briefly indicate some of the more important of the alterations which have been *effected* in the Ecclesiastical department ; since, and in consequence, of the Report of the Commissioners.

I. In 1840 the Court of Admiralty was entirely reconstructed, its practice improved, and civil jurisdiction extended.* The advocates, surrogates, and proctors of the Court of Arches were admitted to practise there ; the proceedings of the court were assimilated to those of the common law courts, particularly in respect of *viâd voce* evidence taken in open court ; power to compel the attendance of witnesses and production of papers ; to direct evidence to be taken *viâd voce* before a Commissioner ; to order issues to be tried in any of the courts of *Nisi Prius* ; Bills of Exception to be allowed on the trials of such issues ; and with power to the court (of Admiralty) to direct a new trial of such issues ; to make rules of court ; and to commit for contempt. The salary of the judge of the court was fixed at 4000*l.* a year ; and he was excluded from Parliament, while filling that office. The present judge is Dr. Lushington.

II. The Court of Delegates, as one of Appeal from the Ecclesiastical and Admiralty Courts, has been abolished ; and the Judicial Committee of the Privy Council constituted

* See Stat. 3 & 4 Vict. cc. 65, 66.

the immediate Court of Appeal in such cases:* the judge of the Prerogative Court of the Archbishop of Canterbury, and the judge of the Admiralty Court, being members of the Committee. This was a very important improvement; and one of its effects, as we intimated in a former page (*ante*, p. 512), has been to admit of advocates and members of the Common Law and Equity bar, mingling together in conducting the appeals from the decisions of the Admiralty and Ecclesiastical Courts.

III. The method of procedure against clergymen, for ecclesiastical offences, was entirely altered in the year 1840, by a statute known as "the Church Discipline Act."† It contains, however, some very objectionable provisions, and is likely to be soon considerably modified.

Subject to these and some other minor alterations, the ecclesiastical department of the legal profession has undergone little change, but is menaced with much. Whether it come to pass or not, the account of the system given in the preceding pages, cannot, it is conceived, be uninteresting or useless. If it be altered, the student will be enabled easily to appreciate the nature, extent, and object of such alteration; if it continue in its present state, he will here have sufficient authentic information to guide him in determining whether he will become a practitioner at Doctors' Commons. It is by no means so dull a walk of practice as some have represented it: on the contrary, the civilian is frequently concerned in affairs of great magnitude, of stirring public interest, and often of a most delicate and painful nature. The general nature of his

* See Stat. 2 & 3 Will. IV. c. 92; 3 & 4 Will. IV. c. 41; 6 & 7 Vict. c. 38.

† 3 & 4 Vict. c. 86.

researches requires his possession of superior acquirements and qualifications. No one can read the arguments and judgments contained in the invaluable series of Ecclesiastical Reports, commenced, as we have seen, by Dr. Phillimore, and since carried on by a succession of able civilians, without admiration of the talent, and learning, brought to bear upon the matters submitted for the investigation and decision of these Courts. Nor do we believe that there is good ground for the accusation, that their method of obtaining and dealing with evidence, is so imperfect and unsatisfactory as to fail of eliciting the truth. Some of the most eminent practitioners in the Common Law and Equity Courts, when examined before the Commissioners, to whose Reports we have so often alluded, gave decisive testimony to the superiority of the method * of examination pursued in the Ecclesiastical Courts, over that of the Equity Courts—especially in Will Causes,—as well as to the expedition and effectiveness of their conduct of the suits there instituted.† It has produced those whose genius and learning have shed imperishable lustre upon their country, as is testified in enthusiastic terms, by some of the most eminent foreign jurists. The intimate concernment, moreover, of its professors, and practice, with the CIVIL LAW, must ever invest it with interest, in the eyes of all those who can rise above the petty and vulgar prejudices, with which many regard that majestic monu-

* In a work of fiction, written by the author, entitled "Ten Thousand a Year," one of the objects of which was to exhibit a popular view of the working of our legal system, the author has endeavoured to illustrate, amongst other parts of it, the mode of obtaining important evidence in ecclesiastical suits. See vol. iii. pp. 310, *et seq.* (2d ed.)

† See the evidence of the present Lord Campbell. *Report*, p. 227.

ment of the wisdom of past ages—one of which that distinguished American jurist, Chancellor Kent, has thus eloquently spoken:—"The whole body of the civil law will excite never-failing curiosity, and receive the homage of scholars, as a singular monument of wisdom. It fills such a large space in the eye of human reason; it regulates so many interests of man, as a social and civilised being; it embodies so much thought, reflection, experience, and labour; it leads us so far into the recesses of antiquity, and it has stood so long 'against the waves and weathers of time;' that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitudes of a majestic ruin."*

The principal work on Ecclesiastical Law, is that of Dr. Burn, of which a new edition, edited by Dr. Robert Phillimore, of Doctors' Commons, was published in 1842, in four vols. 8vo. It incorporates all the alterations effected in that branch of law, down to the date of publication. Mr. Rogers, Q.C., of the Common Law Bar, also published, in 1840, in 1 vol. 8vo., a Practical Arrangement of Ecclesiastical Law, including a Treatise on Prohibition. This work is very convenient and useful to the Common Lawyer for occasional reference. Mr. Chitty's General Practice of the Law also contains a copious account of the Ecclesiastical Courts, and the method of procedure in them. The latest publication on the subject was in 1844, by Mr. Law (the Chancellor of the

• 1 Kent's Comm. p. 548.

Bishop of Lichfield), entitled—"Forms of Ecclesiastical Law, or the Modes of Conducting Suits in the Consistory Courts," in 1 vol. 8vo (2d edit.), containing numerous extracts very well arranged, from the chief writers on Ecclesiastical Law. The Ecclesiastical Reports have long been celebrated, both at home and abroad (as already intimated), for the numerous and masterly expositions which they contain, not only of the principles of Ecclesiastical, but also International Law, by Lord Stowell and his distinguished successors.

CHAPTER XIV.

HOW TO COMMENCE AND PROSECUTE THE PRACTICAL
STUDY OF THE LAW.

HAVING now surveyed every department of the legal profession, let us express a hope that we have redeemed the pledge with which we entered upon the arduous undertaking,* namely of exhibiting to the student a correct outline of the country before him,—of the entire legal profession, in its existing state, and as he will find it, upon adopting that branch of it which he may have deemed most eligible. We must now, however, proceed to discuss a question to which probably no two members of the legal profession, whether judges or counsel, will return the same answer: namely, how the practical study of the law should be commenced and prosecuted. “Of those who are so civil,” says Roger North, in a passage quoted in an early part of this work,† “as to assist a novice with their advice what method to take, few agree in the same: some saying one way, and some another; and amongst them, rarely any one that is tolerably just. Nor is it so easy a matter to do it, that every one should pretend to advise: for most enter the profession by chance, and all his life after *is partial to his own way*, though none of the best: and I scarce think it is harder to resolve very difficult cases in law, than it is

* *Ante*, p. 276.

† *Ante*, pp. 9, 10.

to direct a young gentleman what course he should take to enable *himself* to do so." This was said nearly two hundred years ago ;* but it is perfectly true at the present day—principally on the grounds suggested in the introductory chapter of this work, and which it is superfluous to reiterate. We may, however, briefly express concurrence in an observation of Mr. Starkie, in his preliminary lecture at the Inner Temple in 1834-5,† That "the neglect, or omission, of a systematic preparation, previous to the commencement of the advocate's career, is a very remarkable, and a very characteristic circumstance, connected with the history of jurisprudence in this country." It is very possible that, one of the chief causes of such a state of things, is to be looked for in that application to the legal profession, of the principle of *the division of labour*,‡ which has had the effect of dividing our profession into the several departments which have just passed under our review. Were it otherwise—were there only one general court, regulated by the same rules of practice, governed by the same principles, and attended by the same practitioners, then it might perhaps be reasonable to expect that some uniform course of legal education should be prescribed by the competent public authorities, and be, possibly, of a collegiate character. While, however, one meditating an entrance into our profession, sees its various departments mapped out before him, and is, if a thoughtful and prudent person, seldom disposed, or indeed qualified, to select *at once* the particular one to which he is to devote his future life—to determine whether he will practise at the Equity or the Common Law Bar—or in con-

* At all events somewhere about 170 years ago. *Vide ante*, p. 9 (note).

† Legal Examin. vol. ii. p. 443.

‡ *Ante*, pp. 283, *et seq.*

veyancing—or apply himself to criminal law—or betake himself to the ecclesiastical courts,—it certainly would appear somewhat unreasonable, to prescribe one uniform course of legal education, to all classes of students. It is true that the great leading principles of jurisprudence on which is based our own municipal system, as well as those of all other civilised countries, are well settled, and capable of being scientifically and satisfactorily communicated to students, as the ground-work of all future acquisitions. But it is also undoubtedly true, and the acknowledgment is made reluctantly, and with pain, that the scientific study of law is rarely at present cultivated with that earnestness of purpose, that deep devotion, that deliberation and perseverance, on which alone can be founded valid pretensions to the title of A GREAT LAWYER. The tendency of the day is—to make “lawyers in haste,” to adopt the significant and sarcastic expression of Sir Edward Coke. Sons and fathers are equally impatient for the commencement of the supposed money-making process: and at the very earliest moment that the regulations of the Inns of Court will admit of, the hopeful youth is seen at Westminster, flushed with eagerness and expectation, panting in professional costume, ready and eager to obtain business, for the discharge of which he is in truth utterly unqualified, but into which he may nevertheless be thrust, and be *for a while* sustained, by the determined efforts of the ‘connection’ by which he is backed. His incapacity, however, will he is assured, soon demonstrate itself—and precipitate exposure, and consequent professional failure, in spite of all that can then be done to prevent it. *Incomparably better off is he who has not yet been tried, for even a long period, than he who has been tried,*

and found wanting: and this is a truth which ought to sink deep into the mind of the most eager and ambitious student, and of his parents, friends, and supporters.* The same cause operates also, too frequently, in producing a hasty and imprudent selection of one of the various departments of our profession,—imprudent, with reference to either the physical and mental qualifications, or the position in life, connection, and prospects, of the student. Alas, how many painful illustrations of the truth of these remarks, are afforded by a survey of the perpetually augmenting numbers of the English bar! How many come to it as if, in truth, the business of the bar were mere play—requiring little or no previous training—and who imagine, moreover, that they may rely on every *promise* of support made—or supposed to have been made—by professional friends and acquaintances: expecting to be thrust, *instantly*, into the full course of professional employment, under the absurd idea that even were such to be the case, they would be QUALIFIED to encounter “the occasion sudden, the practice dangerous,” ominously spoken of by Sir Edward Coke!† How many hundreds are at this instant secretly cursing the hour of their entering

* The late experienced and eminent Mr. Chitty, in one of his latest publications, thus handled the same topic—and very few were qualified to speak on the subject with such authority:—“It has become the practice, almost without any previous study, to continue a pupil in a pleader’s or conveyancer’s chambers, for a very short time, as if merely to obtain the reputation of having been there; when at least two, if not three, years’ close attention to the practice in the preceptor’s chamber is essential. It is really scarcely *honourable* to endanger the interests of clients, by assuming to practise upon such very slender information as has of late been deemed necessary. If this practice be attributable to the amiable desire of *sons* to relieve their parents from expense, the *latter* should take care to prevent the mischievous influence of any such sentiments.”—*Gen. Prac.* vol. ii. p. 41, note (k).

† *Ante*, p. 8.

our fearfully overstocked profession ; are bitterly acknowledging the folly of having ever committed themselves to its intense rivalry and fierce competition, destitute, too, of all real training and qualification ! Thus comes it to pass that the student's great and immediate aim and object, from the moment of his entering an inn of court, too often is to acquire, as expeditiously and economically as possible, such a smattering of practical information, as may make him to 'do the business,' which he possibly may, for a short time, through family or other influence, find ready to be *done* by him. He has not acquired business habits ; has undergone little or no mental discipline ; possesses, in reality, no solid professional knowledge—and yet holds himself out as capable of practising *in Banc*, or at *Nisi Prius*, and answering any cases, and drawing any pleadings, and conveyances, which may be brought to him !—To return, however, to the topic with which this chapter commenced—the discrepant opinions as to the proper mode of commencing and prosecuting the practical study of the law—since the student is, really, from whatever cause, left in this matter to the precarious and conflicting suggestions of individuals.* How, then, shall he begin ?—Solitary reading is recommended by some ; but for how long a period, or of what books—no two advisers are agreed. Preliminary attendance, for a short period, in an attorney and solicitor's office, is urged by others. Some are for the student's commencing in the chambers of a conveyancer ; others in those of a pleader. Attend lectures, say a few. Acquire a store of general principles, to begin with, say some ;—plunge at once into actual business,

* *Ante*, p. 9.

and obtain gradually from *practice* your knowledge of principles, say others.

What shall we say?—That we are deeply sensible of the difficulty of the task which we have undertaken, in offering an answer to the question which has received, and will probably long continue to receive, such different answers; but have, for a considerable series of years, had the benefit of conversing on the subject with the ablest and most eminent members of the legal profession, in all its departments, and many opportunities of witnessing the respective advantages and disadvantages, attending the different courses of legal education, adopted by those who have failed, as well as by those who have succeeded, in the profession. The ensuing suggestions, therefore, are offered with the utmost deference; after the most mature consideration; and with the expression of an earnest wish that the student will, before he act upon them, avail himself of every opportunity which may offer itself, of consulting those experienced members of the profession, on whose judgment he may feel warranted in relying, as to the propriety of the course about to be suggested.—Let us commence by recalling attention to one of the main objects which we proposed,* in attempting a delineation of the three grand departments of the profession,—viz. to satisfy the intelligent student, that there is far more *in common* between those departments, than of that which is *peculiar to each*: that it is therefore foolish and dangerous to confine his attention to the particular province in which he may intend to practise. This observation applies even to the case of an intended Advocate at Doctors' Commons; as

* *Ante*, p. 286.

we endeavoured briefly to show in the preceding chapter : but it applies with tenfold force to the intended practitioner at either the common law, equity, or criminal bar, to the pleader and conveyancer. If all our labour in the last six hundred pages, have not, however, been utterly thrown away, the student will require nothing further to be advanced on this head. Of one thing we remain as fully persuaded as when we expressed the opinion in the former edition of this work : that as soon as a man shall have determined upon coming to the bar, the sooner he gets into harness,—so to speak—that is, enters upon the practical study of the law—the better. But can that be done by commencing a course of solitary reading? We think not. In the first place, there are, perhaps, comparatively few of those who have come of late years to the bar, who are *capable* of prosecuting effectually, vigorously, and systematically, a course of solitary law-reading : and even were it otherwise, few, very few, are the books—such are the fluctuations which the law has undergone, and is still undergoing—which can be safely relied upon for that purpose ; and many erroneous impressions may be produced in the mind, such as it will require infinite pains afterwards to efface ! One of the author's ablest friends, who has now quitted the profession, and was skilled in the criminal law, in a communication relative to that subject now lying before the author, thus speaks of Nolan's Treatise on the Poor Laws, which he had made the subject, in his early professional days, of intense study. 'I have been greatly misled by it, and have never been able *thoroughly* to eradicate the now erroneous principles of the law of *Rating*, so diligently, and I may say painfully, acquired in my early days.' Another friend

of the author's, now rising rapidly and deservedly into eminence, on hearing the preceding paragraph read, observed with a smile that he also had been an illustration of some of the evils of a course of private reading before entering with a pleader. On quitting college, he set himself down to a year's solitary and "hard" reading—devoting special attention upon the second volume of Blackstone's Commentaries, and the corresponding portions of Coke upon Littleton. Conceiving it to be of the utmost importance to become accurately acquainted with the old tenures, he almost committed to memory all those portions of the work in question, which related to that subject: perpetually exercising himself in the law of Knights' Service, Homage, Fealty, Escuage, Wardship, Escheat, Lineal and Collateral Warranty, and so forth: 'and you may conceive,' says he, 'my mortification, on discovering how completely my labour had been lost—though I certainly acquired in the same time some valuable knowledge of parts of real property law now too generally neglected.' Another friend had thus 'read up' with great care, a particular head of Commercial Law, and completely mastered all the fine-drawn distinctions to be found in the cases cited in the book which he had been reading. Almost the first thing that befel him on entering chambers, was his confidential intimation to a fellow-pupil of the feat which he had performed. 'Ah, my friend,' he replied, 'have you never heard of such and such a STATUTE? Thank Heaven, it's given the *coup-de-grâce* to all *that* nonsense!'

It is true that some notion may certainly be acquired of the general scope of our legal system; but beyond that, preliminary reading will do but little for the student. 'There is a monotony attending retired study,' says an acute

writer,* from whom we have already quoted, 'by which the attention is apt to be fatigued, and the spirits exhausted: while, on the contrary, the effect of oral communication, is to keep the mind on the alert, and to render the understanding more active. Besides: if any doubt or difficulty present itself, it may be instantly cleared up; any mistake corrected; every difficulty removed.' A man of disciplined and powerful intellect may undoubtedly derive great advantage from any course of reading which he may think fit to adopt: but how many are unequal to such an effort; how few can make the attempt, and persevere in it for any considerable period, without the serious risk of falling, at length, through difficulty after difficulty only half-mastered, or entirely passed over—into a superficial, erratic, and slovenly habit of mind which may prove incurable! There is an observation of our great philosopher (Lord Bacon) which is worthy of being pondered by every student. "The ordering of exercises is a matter of great consequence, to help, or to hurt:—for, as is well observed by Cicero, men, in exercising their faculties, if they be not well advised, do EXERCISE THEIR FAULTS, and get ILL habits, as well as good: so that there is a great judgment to be had in the continuance and intermission of exercises."† Nor is this consideration the only one to be borne in mind, upon this subject. The period of life at which study for the bar is usually commenced, is one at which *every* month is precious—especially adverting to the brief interval which now-a-days elapses between commencing the study, and the practice, of the law. Such is

* Ritso's "Introduction," p. 146.

† Advancement of Learning, vol. ii. p. 217.

universally the case, and *our* student must needs not be behind all his competitors, by expending any portion of his time upon an inferior method of acquiring legal learning. If, from special circumstances, he be enabled conveniently to devote a month or two to preliminary reading, before entering the chamber of a practitioner of the law, we know of no works more profitable for his perusal, after some one of those already suggested,* on the Feudal System, than Sullivan's Lectures on the Constitution and Laws of England, or the second volume of Blackstone's Commentaries, followed by Mr. Williams' Principles of the Law of Real Property: always bearing in mind, however, in perusing Sullivan and Blackstone, *first*, the great alterations in the law which have been effected since their time; and *secondly*, the necessity of knowing the pre-existent law, in order to understand and appreciate that which is now in force. One who has determined to devote himself to common law practice, whether at the bar, or in chambers as a pleader, may content himself with a perusal of Sullivan—of Stephen on Pleading—and some elementary work on the law of evidence: say the early part of the masterly first volume of Mr. Starkie's Treatise on the Law of Evidence, or Greenleaf on Evidence—an excellent work now in course of adaptation, as we shall presently explain, to the existing state of English Law.—A perusal of these works, or any of them, with moderate attention, will take off the edge of strangeness and novelty from the proceedings which he will have to encounter, upon entering on his career at chambers.—So much

* Pages 254, *et seq.*

for SOLITARY READING. Another, but very limited and decreasing class of advisers, recommend an attendance on LECTURES, as the best initiative step for the young lawyer. The author has already, in an early part of this work, expressed his decided opinion upon this subject,* and cited distinguished authorities in support of it. To these the author begs to refer the reader: expressing at the same time, again, his strong conviction that lectures are at all events a very inferior and imperfect mode of communicating, in the first instance, the elements of law, to the student who has the opportunity—which all ought to have who study for the bar—of referring in all his practical difficulties, to an experienced practitioner of the law, assisted by his library. There are so many excellent summaries of the law, in its different departments, in the shape of treatises—well arranged, digested, and corrected down to the present day—as to form, under the guiding eye of a competent tutor, greatly superior substitutes for the lectures of even the most able and experienced lecturers. It is in these ‘Introductory Lectures’ alone, generally speaking, that any allusion is made—and that with unsatisfactory vagueness, to the *manner* in which the student should apply himself to the study of the law: the remainder of the course being devoted to epitomising various heads of law, the subjects being, nevertheless, often so abstruse and complicated, as to render it utterly impossible for any but a very expert note-taker,—and he, too, pretty familiar with technical terms—to follow the lecturer with even the most moderate amount of success. In the great majority of instances, however, how liable is the auditor to catch at wrong

* *Ante*, pp. 13, *et seq.*

notions—to imagine that he has acquired a *knowledge* of that to which he has only listened—to misunderstand the drift of all that has been uttered! One of the ablest law lecturers was Mr. Amos, who lectured at the London University, about the year 1834-5: and the following are the *summaries* of two of his lectures, taken from the authorised published copies. The first runs thus:—

“ Corporeal, Incorporeal, and Derelict Property; Blackstone’s Classification; Property why called Incorporeal; Corporeal Profits and Incorporeal Property; Modes of Transferring Property; Livery of Seisin; Statute of Frauds; Uses; Effect of Stat. Hen. VIII.; Springing and Shifting Uses; Transfer by Deed; Effect of Delivery; Statutes requiring Signature contrasted with the Common Law; Authorities respecting Execution of Deeds collected; Escrows; Antiquities of Deeds; Maddox’s Formulæ; Spelman’s Posthuma; Hicke’s Dissertation; Fortescue De Laudibus; Antiquities respecting Witnesses to Deeds; Saxon Deeds; Things in Livery and in Grant; Easements and Interests in Land; Opera Tickets; Fisheries; Grants; Seisin in Demeane; Derelict Property; Occupancy; Running Water; Public Property; Right to Fish and Shells in Sea; in Arms of Sea; on Shore of Sea; Hale De Jure Maris; Free Fishery, Several Fishery, Common of Fishery; Right of Towing; of Gleaning; of Bathing; Treasure-trove; Waif; Anecdote respecting Treasure-trove; Foreign Codes respecting Public Rights; Royal Rights in Unclaimed Property; Wreck; Royal Fish; Game; Free Warren; Chace; Swans; Pepysian Library; Bastards’ Effects; Maritime Accretions: Town of Hastings; Lincolnshire Coast; Manuscript Treatise, temp. Elizab.”

Another lecture is headed thus:—

“ Real and Personal Property; Terms for Years; Derivation of the term ‘Chattel’; Diversity of Situations between Tenant for Years and Tenant for Life or in Fee; Causes of this Difference; Changes effected by 21 Hen. VIII. c. 15; History of the Action of Ejectment; Limitations by way of Executory Devise; Doctrine of Uses; Duke of Norfolk’s Case; Mr. Butler’s Note on that Case; Fearne’s Essay on Executory Devises; Leasehold Qualification to kill Game; to become Jurors; Repeal of the Declaration of Rights, by Mr. Peel’s Jury Act; Wife’s Right of Survivorship to Chattels Real; Writ of Elegit; Effect of this Writ upon Trust Estates; Liability of Real Property to satisfy Debts; Lands of Bankrupts; Estates by Statute Merchant, Statute Staple and Elegit; Devices for Payment of Debts; Presentations of Advowsons; Ancient Principles upon which Distinctions between Real and Personal Estates are founded; Feudal System; Different Senses of the word Freehold.”

Now admitting all these topics to be handled with competent ability—are they not manifestly better adapted for illustration by a course of instruction, illustrated by practice in a conveyancer's, pleader's, or barrister's chambers, than in a public lecture-room? Giving the greatest credit to the lecturer for industry and talent, yet to say nothing of the intervals which must elapse between the delivering of each lecture,—how few of the youthful hearers give adequate attention to the lecturer,—are able, or willing, to follow him—to connect each lecture with its predecessor—to take correct and sufficiently copious notes, and work them out in private reading! And how great are the temptations to inattention and irregularity arising out of a promiscuous intercourse with numerous fellow-pupils! What a disparity between taste, talents, and acquirements! What a diversity of pursuits and objects!—Mr. Amos, in one of his early lectures, himself drew a lively picture of the difficulties to be encountered by one undertaking the office of Law Lecturer. Every one of the ensuing sentences seems to supply an argument against the system:—

“The person undertaking to lecture law students, stands under circumstances which lecturers on other subjects have rarely to encounter. Each student is interested almost exclusively in that circumscribed range of legal knowledge, for which he is likely to have occasion when he practises for himself. And thence it happens that what will keep the eyes of one student broadest awake, will set the eyes of another student fast asleep. Again, there is found every shade of disparity in the acquirements of pupils, to say nothing of their abilities. Some have yet to learn the veriest elements of law, others want only some

finishing touches to their education. In this difference, they may be compared to vessels in a fleet, where the swiftest sailers are always on the point of upbraiding the delay of their commodore; and the slower are always apprehensive of being left behind. Again, the law student has, most probably, been engaged during the day in some kind of legal pursuit or another; he comes with a full stomach of law, and is, therefore, not a little dainty about his food. He comes, also, of an *evening*, when not unfrequently, from very natural causes, his spirits invite him rather more to occupations of an *allegro* than of a *penseroso* kind.”*

All things considered, then, the only safe and advantageous method of commencing the practical study of the law, appears to be by entering as a pupil the chambers of its practitioners. Let us, first, take the case of a student who has come to the determination of adopting the common-law branch of the profession—intending, not to be called to the bar as soon as he is eligible, but to *practise as a PLEADER* for either a few years, or for his life. We have maturely considered the weighty opinion of Mr. Preston, communicated at the close of the eleventh chapter,†—that the study of the Law of Property should precede that of Pleading and the Practice of the Courts. We venture, nevertheless, but with profound deference, to advise the class of students whom we are now addressing, to commence with a year’s attendance at the chambers of a Pleader, who has such a moderate practice as will admit of his giving personal instruction to one or two pupils. Nothing can be more absurd than to *commence* in the chambers of the more eminent pleaders,

* Introd. Law Lecture, Legal Exam. vol. ii. pp. 221, 222.

† *Ante*, pp. 577, *et seq.*

where a very large business is carried on, calculated only to harass and bewilder the tyro : no leisure being given him for the deliberate acquisition of that knowledge which alone will enable him to derive advantage from seeing, and taking part in, the business going on around him. It is with a firm conviction of the truth of this remark, founded on some fifteen years' experience and observation, that the author would entreat the student not to fall into the error here reprobated, but take the course now suggested, of seeking for his first tutor, some able but junior practitioner—such as very little inquiry will enable him to meet with ; and, having taken this step, let him fixedly resolve to devote himself, during the whole of the ensuing twelve-month, *calmly and patiently to the acquisition of the veriest elements of his profession*—shrinking from the bare idea of ever attempting to become a **LAWYER IN HASTE**. In the first two or three months, the student should give himself little or no concern about *drawing*, but bestow his entire attention upon the acquiring a familiar knowledge of the elements of **PLEADING** and of **PRACTICE**, in order that he may thoroughly comprehend the nature of the technical language of the law, and the machinery by means of which it deals with civil rights and wrongs. Till this shall have been done, he will be unable to peruse satisfactorily a single case in the Reports, or extract instruction from either reading, or assisting in preparing pleadings or opinions in chambers. This subject will, however, be discussed more in detail in an ensuing chapter. For the present, suffice it to say, that the student's first two months will have been well bestowed, if he shall have completely mastered the first part of Mr. Sergeant Stephen's Treatise on Pleading, and a little volume written by Mr. J. W. Smith, entitled the

"Elementary View of the Proceedings in an Action at Law," which extends to two hundred pages only, and affords a concise and *elementary* view of the whole course of an action, in its existing and remodelled form. By this time the student will be able to draw the simpler class of pleadings, and to do so with increasing profit and pleasure; at the same time proceeding with the second part of Stephen on Pleading, which unfolds, in a very masterly manner, all the leading principles of the system. At this stage of his pupilage, the student should endeavour to acquire a general knowledge of the very important matters which form the subjects of the first and second chapters of Chitty on Pleading—viz., PARTIES TO ACTIONS, and FORMS OF ACTIONS. We say, at this stage, a *general* knowledge; but, as these topics involve, directly or indirectly, almost all the doctrines of the law, it is needless to say that they must, at the earliest period practicable, become the subjects of profound study.* A few of the fundamental doctrines of the law of EVIDENCE pointed out by the tutor, should be also read very attentively; together with Mr. Williams' Principles of the Law of Real Property, and such heads in Chitty on Contracts, or Selwyn's Nisi Prius, as will best illustrate the bulk of the business in chambers, and are of leading importance: such as Bills of Exchange—Agency—Partnership, and Insurance: four grand heads of Commercial Law,

* The subject of *Parties to Actions* is satisfactorily treated by Mr. Broom in a small volume, under that title, containing the existing law, neatly and conveniently arranged, and well adapted for students. As far as the present writer's examination of the book has gone, it appears to be accurate: and if the student should be unable, in the early stage of his pupilage, conveniently to afford to purchase the expensive work of Mr. Chitty, he may procure the little book in question.

the first three of which are the subjects of three able and thoroughly elementary Treatises, by Professor Story, recently republished in this country. Thus in his first twelvemonth, will have been obtained a fair *insight*—but only an insight—into the law of pleading, evidence, practice—of real property and commercial law: and during the same time, an intelligent student will have become able to appreciate the immense importance of acquiring that branch of knowledge which is to be sought for only in a conveyancer's chambers—where are prepared all those instruments relating to the transfer of real and personal PROPERTY, many of which will have already come under the student's notice. A glance at that section of the second volume of Chitty on Pleading, entitled "Declarations in Covenant—'TITLE PLEADED,'" will illustrate our meaning. It consists of recitals of different Tenures, Estates, Quantities of Interests, Conveyances, Wills, &c.; and were framed by Mr. Chitty, with great care, with the assistance of Sir Edward Sugden, the present Lord Chancellor of Ireland. Let, then, the student's second year be spent with a conveyancer; preparatory to which, Williams' Principles of the Law of Real Property, should be re-perused very attentively. The reason why we recommend the second year and not the first, to be spent with a conveyancer, is, that as already hinted, by so doing the student will have become able better to appreciate the nature of conveyancing learning, and of those portions of it most frequently and directly brought into play, in Common Law practice. He will pay special attention to the preparation of those instruments, and those doctrines of conveyancing, which his Common Law tutor will have pointed out to him as most worthy of his study with a conveyancer—*e. g.*, the various species of Leases, Mort-

gages, Settlements, Bonds, Annuity Deeds, Wills, &c. &c. Now if the student were to *commence* with the conveyancer, he would lose this advantage, and give his attention indiscriminately to the whole course of a conveyancer's business, without that special reference to the parts of it most useful and important for the common lawyer. There will be no difficulty in meeting with able conveyancers, and in fair practice, who have both leisure and inclination to read with their pupils,—a matter of paramount importance in the present state of real property law. The course of reading to be pursued there, will depend upon the tutor. It may possibly comprise portions of Coke upon Littleton, Sanders on Uses and Trusts, Sugden on Powers, and on Vendors and Purchasers of Estates, and Jarman on Wills. If the student's means or leisure will admit of his spending six, or even twelve months, in the chambers of an Equity draftsman, he will derive most important advantages from so doing; as we trust has been made evident in our chapter on Equity, to which we would now refer him. Armed with the knowledge thus derived, let the student betake himself to the chambers of a pleader in large practice, or a pleading barrister, and bestow all the energies of his mind upon the important business which he will see constantly passing before him. Here will be no course of reading—that is quite out of the question with those gentlemen, who have so large a practice as leaves them scarce a leisure moment, from morning to night. During this, his third year, the pupil will find himself miserably at a loss, if he should have not acquired, or should have lost, a knowledge of the higher branches of pleading. Chitty on Pleading, Saunders' Reports, and the volume of Comyn's Digest, entitled "Pleader," must never be out of his hands

during this important period of his studies ; and the same may be said of several other standard works, to which he will necessarily be in habits of constant reference. *Advising on Evidence* will here be a prominent and instructive source of responsible employment, and will demand great attention. In short, this is the year in which an able pupil will distinctly see the bearing upon each other of Pleading, Evidence, and Practice—that is, the entire system of the Common Law. His third year of pupillage over, he may venture to *commence* practice as a Pleader, and prosecute the *study* of the law, with downright earnestness. This is a most critical period in the young common lawyer's career; one which generally determines his professional character and prospects in life. If so disposed, and he be made of superior stuff, he will now address himself to the acquisition of a scientific knowledge of his profession. He is not likely, for two or three years, to be distracted with business; and may consequently prosecute his studies calmly and uninterruptedly. If, instead of doing so, he become indolent, or get disheartened, and acquire desultory and superficial habits of reading and study, he will quickly lose all his previous acquirements, and become incapacitated from future successful exertion, either below the bar, or at the bar.—If the pleader determine, after a few years' practice, to be called to the bar, he will devote his best attention to the law and practice of *Nisi Prius*, particularly to Evidence, and the examination, &c. of witnesses; and also endeavour to qualify himself for business *in banc*, by familiarising himself with that class of it which, as he will be by that time aware, is generally entrusted only to the members of the bar. On this last topic we need not now dwell; but refer the reader to the details

which will be found in the preceding and subsequent chapters of this work.

(2.) The next case to be considered is that of a student not intending to practise as a pleader, but to be called to the bar at the earliest practicable period, and *commence with Sessions' practice*. Him also we recommend to begin with a twelvemonth's attendance in the chambers of a junior pleader, who reads with pupils; to spend his second year with a conveyancer who does the like; then, at least half a year with an Equity draftsman; then either two years with a pleading barrister, or one year in private reading, and the other with a pleading barrister; and the six months immediately previous to his being called to the bar, with some barrister practising at sessions, in accordance with the recommendation contained in the twelfth chapter.* We venture to repeat here, that we attach great importance to this last suggestion, which we are satisfied will, if fairly acted upon, confer great advantage on the student.

(3.) He who intends to *become a CONVEYANCER*, should spend his first and second years with a conveyancer; his third with an Equity draftsman, and a fourth year with a pleader, or pleading barrister: or say, that the second year be spent with an Equity draftsman, the third with a common law pleader, or pleading barrister; and the fourth with a conveyancer. Whichever of these two arrangements may be adopted,—or however the order of attendance may be varied, we trust that sufficient appears in our accounts of the respective departments of Equity, Common Law, and Conveyancing, to convince an intelligent student, that that conveyancer's education will have

* *Ante*, p. 619.

been most imperfect and superficial, who shall venture on commencing practice, without having acquired a clear insight into the two departments of Equity and of Common Law.

(4.) The student who intends to *practise at the Equity bar*, should spend at least a year with a conveyancer, another with a Common Law pleading barrister, and two years with an Equity draftsman: or two years with a conveyancer, one with a Common Law pleading barrister, and the last year with an Equity draftsman.

(5.) Let us, finally, suppose the case of one entering the profession, but entirely *undetermined as to which of the departments* he will select. We venture to recommend him to peruse the preceding chapters; in which we have, we trust, faithfully delineated all the various phases of the profession, as he will find them, on finally making his choice. If still irresolute, we would recommend him to commence with a conveyancer, in strict accordance with the advice of Mr. Preston. At the close of his first year, he can spend a second in the chambers of a common lawyer, or Equity draftsman, according as his inclination may prompt him: and by that time he will doubtless have been enabled to make his election, and dispose of the remaining period of pupilage accordingly.

Such being the practical suggestions which we have to offer on the subject proposed to be examined in this chapter, and into which we should have entered in greater detail, but for the numerous suggestions, upon the same subject, contained in the chapters in the various Departments of the profession, we have yet some general observations to make upon the topics discussed in the immediately preceding pages of the present chapter.

I. Some readers may possibly imagine, that in naming a period of four years, as that of the requisite pupillage, with its attendant expense of four hundred guineas, we are prescribing an amount of time, labour, and expenditure, which is unusual, or unnecessary,—and calculated to dishearten the majority of students, and their friends. We beg in reply to say, *first*, to those who are not pinched for means, and have the requisite time at their disposal,—Consider for what a great, powerful, and lucrative profession, in which all the student's life is to be spent, and on which his most ambitious hopes and desires are to be expended, he is called to undergo no longer a probation than of four years, and no larger an expenditure than of four hundred guineas. Compare either with those prescribed to the young attorney or solicitor, or the medical, or engineering student: and they will surely appear sufficiently reasonable and moderate. No one who has formed correct practical notions upon the subject, would think that four years is too long a period of preparation for the successful practice of a profession, the exigencies of which are so numerous, varied, arduous, and responsible, and the prizes so splendid, as those of the Bar. Nay, we will venture to affirm that a period of at least FIVE years ought to be spent in assiduous pupillage and private reading, before essaying to practise either in chambers or at the bar, by all who can possibly afford to do so: and, moreover, that even at the expiration of that period, the student should regard himself as still barely *in ipsâ studiorum incube positus*—on the very threshold—having had little more than a bird's-eye view of the multitudinous learning of the law. We know that this sounds strangely to those who, ignorant and incapable of the

viginti annorum lucubrationes of our legal forefathers, advert to the present railroad rapidity of access to the bar—when so trifling an interval elapses between a lad's quitting school, or an attorney's office, and appearing in wig and gown at Westminster. But what is the practical result of such a system? To swell the bar with perpetual tributary streams of mediocrity and incapacity: incessantly adding to its numbers those who can never do the least credit to it—who cannot even conceive the idea of *excellence*, having neither the inclination nor ability to make the requisite effort or sacrifice, but simply a disposition—nay, determination—to keep, for a brief while, their ground, by reliance on unfair and discreditable sources of support. When a man holds himself out for practice, he undertakes, as we have already said, to be equal to the discharge of whatever business may be brought to him, though it may happen to require his possession of much knowledge of the very existence of which, it may be, he had never dreamed—and the possession of a degree of practised talent, of which he can never become possessed. He must then either rely unfairly on the assistance of those who have bestowed their own best energies upon the profession, thanklessly and in vain; or injure, and it may be, ruin, the interests of his clients, and fatally commit himself. We repeat, then, that if the student can by even great efforts and sacrifices, command the requisite time and funds to secure a five years' pupillage, he ought to do so, and cheerfully. Some of those now reflecting the highest lustre upon the bar, have, to the author's knowledge, adopted the course suggested; making themselves acquainted, during a period of five years' pupillage, with each of the great departments of Common Law,

Equity, Conveyancing, and Criminal Law.—*Secondly*, In the case of those who really cannot command this amount of time, and of funds, it must needs be abridged and limited: but the deficiency ought to be compensated for by proportionately-augmented energy and industry, and the just consciousness of superior talent and fitness for the profession. Under such circumstances, half a year passed with a junior pleader, of competent ability, and a similar period with a similarly qualified conveyancer, followed by twelve months with a pleader or pleading barrister in first-rate practice, and subsequent sedulous solitary study previous to entering into practice, may afford the student a fair amount of training. But to him, and to all whom it may concern, let us offer a cautionary whisper—that an imperfectly-educated lawyer, early forced into business, will be exposed to constant and excessive anxiety, restlessness, and labour—dreading every moment to go wrong—compelled to act, and yet fearful, and not knowing how to act, with safety or credit: a state of things calculated to destroy all the enjoyment of existence, and shorten an unhappy life.

II. It is hoped that nothing in the foregoing pages of the present chapter will be construed into a desire to disparage reading—private reading—or represent it as otherwise than an invaluable AUXILIARY, to the study of the law. All that is desired by the author, is, to express his strong conviction, that for the purposes of a successful practical legal education, solitary reading is not the best, nor indeed a safe, method of *commencement*; but at the same time, an obviously indispensable *accompaniment* of chamber tuition. We have already spoken* of the dangerous

* *Ante*, p. 669.

facility with which erroneous notions may be acquired by the unaided student, and insisted on the superior advantages enjoyed by him who has placed himself under the guidance of a competent teacher, whose object is, to make reading illustrate business, and business illustrate reading: to stimulate *all* the mental faculties: to inculcate early a practical turn of mind; to induce a legal habit of thought; augmenting at once, and with sensible rapidity, both knowledge, *and the power of using it*. Let us, in order more clearly to explain our meaning, and at the same time afford a specimen of the chamber practice of the common lawyer—suppose a student, in his solitary and diligent perusal of the second volume of Blackstone's Commentaries, to have arrived at that part of the thirtieth chapter which relates to the important and extensive subject of "Title to things personal—*by Contract*." He will find the law thus laid down, concerning the Sale of Goods:—

"If a man agree with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no SALE without payment, unless the contrary be expressly agreed: and, therefore, if the vendor says—the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price be paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arraha*, and interprets to be '*emptionis venditionis contractæ argu-*

mentum'), the PROPERTY of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to *earnest*, as an evidence of a contract, that, by the statute 29 Car. II., c. 3, § 17,* no contract for the sale of goods to the value of 10*l.* or more, shall be valid, unless the buyer actually receive part of the goods sold, by way of earnest on his part, or unless he give part of the price to the vendor, by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made, and signed by the party or his agent, who is to be charged with the contract. And with regard to goods *under* the value of 10*l.*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year; or unless the contract be made in writing, and signed by the party or his agent, who is to be charged therewith. * * As soon as the bargain is struck, the property of the *goods* is transferred to the vendee, and that of the *price* to the vendor; but the vendee cannot take the goods until he shall have tendered the price agreed on. But if he tender the money to the vendor, and he refuse it, the vendee may

* This celebrated statute, which is, by many, supposed to have been framed by Sir Matthew Hale, is one of prodigious practical importance; regulating, as it does, all manner of sales and purchases of real and personal property. It has even been said, "that every line of it deserves a subsidy." Mr. Barrington stated, nearly fifty years ago, that it was a common notion of Westminster Hall, that this statute had not been explained at a less expense than 100,000*l.* ! Numerous decisions cluster about even particular words;—its sections, when coupled with the cases, resemble the little branches of a fruitful vine, each overburthened, as it were, with grapes. "This statute carries its influence," says Chancellor Kent, (2 Comm. 494, note d) "through the whole body of American civil jurisprudence, and is, in many respects, the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights."

seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the *property* is so absolutely vested in the vendee, that if A sell a horse to B for 10*l.*, and B pay him earnest, or sign a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse die in the vendor's custody, still he is entitled to the money; because by the contract, the *property* was in the vendee.—Thus may property in goods be transferred by sale, where the vendee hath such property in himself.”*

Now almost every sentence in the above pregnant paragraph, contains the enunciation of a *principle*, so important and difficult in its application, as to have called forth great numbers of reported decisions; and if the facts of only one of those cases were to be proposed to the ablest and most laborious reader, fresh from his perusal of Blackstone,—even before his *recollection* of it had been at all impaired or confused,—he would find, that the foregoing sentences would be about as serviceable in conducting him to a correct conclusion, as a chorus out of Sophocles. Reading them is really—so to speak—*feeding upon essences*. If they were even to be learnt off by heart—frequently repeated—and imaginary cases framed upon them, the student, when asked the simplest practical questions by commercial men, would find himself as much puzzled as if he had never seen or heard of the paragraph in question; and yet, perhaps, imagine himself fully possessed of the materials for forming a judgment upon them. But he passes on to the next subject, and the one after, and so on, to the end of the volume: and what sort of a *service-*

* 2 Bla. Comm. 447-9.

able recollection can he be supposed to retain of the multitude of principles which have thus fallen consecutively under his notice? "There is another observation to be made on the subject of the Commentaries," says Mr. Starkie, "which is this,—that *where the student extracts general rules and principles from decided cases*, by the aid of his own talents and industry, he is not only possessed of the general rule or principles, but he has also learnt its *practical operation*, and therefore the confines and limits to which it extends,—the boundaries, the *fines*, *Quos ultra citraque nequit consistere rectum*. But, in the Commentaries, where the principle is *already extracted for him*, he learns the principle, with less trouble, it is true,—but then, this is a dispensation with that labour which is one of the most useful exercises to the mind of a lawyer: and which leaves behind it the mere idea of an abstract rule, without any knowledge of its practical application, or of the legal limits which the principle serves to define."—"With respect to the application of the general principles of justice, they are usually obvious; opinions do not generally differ about them; it is in the searching out the proper *principles* in confused and complicated cases of fact, to which the almost infinitely-varied combinations and transactions of life constantly give rise, and in the skilful use of the discovered, or acknowledged, principle, for defining the boundary line between right and wrong, that its practical excellency consists."*—When the

* Mr. Starkie proceeds to select the passage in Blackstone (vol. iii. p. 123), where are laid down the principles regulating the civil remedy for slander; and "in order to shew the practical inefficacy of mere general rules," to put five cases upon, or *deductions* from it, after the manner adopted in the text. See Legal Exam. vol. ii., p. 518.

student at length thinks fit to betake himself, crammed with the fruit of private reading, to a pleader's chambers, he will be in a twinkling convinced of the truth of these observations—hurried as he will find himself, probably, from case to case, from pleading to pleading, in such a manner as to confuse all his recollections of past reading.

Let us suppose, on the contrary, a man taking the course which is here recommended—of entering at once on the scene of actual business, under the eye of one who makes a point of daily prelections with his pupils, designed first of all to familiarise them with the degree of technical knowledge requisite to comprehend the details of business, and then gradually to introduce them to the knowledge and application of principles. Some short time after his morning's 'reading,' the following statement of facts* is laid before him by his pleader, who requests him to read it over alone, and then come and confer with him upon it:—

"Mr. ——— is requested to advise whether, under the following facts, an action can be maintained; and if so, to draw the declaration.

"A, a gentleman farmer, having a cow which was near calving, was asked by B, one of his neighbours, what sum he would take for her. The cow was then in a field belonging to A; who—one of his servants being present—mentioned 13*l.* as the lowest price. After a good deal of bargaining, B agreed to give that sum (but nothing passed as to the *time* of payment), and paid A half-a-crown, to bind the bargain. A said, 'When will you take her away?—you may, if you choose, at this moment.'—'You

* At this moment [1834] in chambers.

had better let her remain in your field till this day week,' replied B. 'Very well—but remember the cow is yours—and if anything happens to her, I will not be answerable.' 'I understand,' said B, and they parted. Three days afterwards, A sent his servant to tell B that the cow seemed ailing, and he had better take her immediately away:—but B said, 'Oh,—I don't care—I'll have nothing to do with her; I don't want her, now. I'm content to lose the half-crown.' The cow got worse, and A sent twice to inform B of the fact, who returned similar answers. After the expiration of the week above mentioned, the cow died in calving. A sent immediately to tell B of the fact, but he had gone to a distant part of the country: on hearing which, A *sold the carcass* for four pounds, and kept the proceeds. Can he, under these circumstances, recover the balance of 8*l.* 17*s.* 6*d.* due to him on the bargain? If so, Mr. ——— will please," &c. &c. 'Surely there cannot be a simpler state of facts than this?' inquires the pupil. 'Why, let us see;' quoth the tutor. 'The cow was clearly *sold*, but was she *delivered* to B? for that is a circumstance most materially influencing the form of action which must be adopted in order to recover the sum demanded by A:—*i. e.*, whether it should be a *special* count in assumpsit for not accepting the cow—or a common count for goods *bargained** and sold, or one for goods *sold and delivered*. If the first of these, assumpsit will be the proper form of action; if either of the two latter, it may be indifferently either assumpsit or debt.

* If the former of these remedies were to be adopted, A would recover only the amount of damage *actually* sustained by him; if the second, he would recover the whole price.—*Smith's Mercantile Law*, p. 470 (3d ed.).

Under the *old* system* we should have had no difficulty; we should have stated our case in all three ways, and so *must* have recovered under one or other of the counts. Recollect, however, that we are now restricted to the use of *one!*' The student is supposed to have become, by this time, aware of the distinctions between these three modes of 'declaring,' and is requested by his tutor to state the facts of the case *memoriter*, to show that he is in full possession of them. This he can do, but owns he is quite at sea about the *law* of the case. "And well you may be," replies his tutor, "for this, which is so common an occurrence, really involves a knowledge of one of the most extensive and difficult branches of law. There are here nearly a dozen important questions to be considered. Observe that this was only a *verbal* contract; that no time was mentioned for paying the money; that earnest was given; that immediate possession of the cow was tendered, but dispensed with, and the vendor requested, for the vendee's convenience, to keep it for a week; that the vendor assented to this—expressly telling the vendee that the cow remained at his (the latter's) risk. He is subsequently informed of the dangerous state of the cow; and then, unexpectedly, repudiates the whole transaction. The cow dies; and what is the effect of the vendor's selling the carcass? Had he a right to do so? If not, what course ought he to have pursued? Was the carcass to lie rotting on the field? Who, at the time of the cow's death, was, in point of law, its *owner*? If the vendee, did the vendor's sale of the carcass operate as, on his part, a rescission of the contract? What should he do with the

* *Ante*, p. 28.

half-crown received as earnest-money? Can he treat the contract as still subsisting, and therefore sue the vendee for the price? If he can do this, then, was the cow constructively *delivered* by the payment of earnest, and *offer* of immediate possession? No time for paying the remainder of the price having been named, was it incumbent on the vendee to tender it, before he could have taken the cow? In other words, did the vendor, notwithstanding all that had passed, retain a *lien* on the cow for its price? If so, could the cow be considered, in any sense of the word, as *delivered*? You see now," continues the tutor, "the multitude of questions which may arise out of so simple a transaction as the present, and the vast importance of having the mutual rights and liabilities of the parties, well settled and defined; which frequently cannot be done, in case of a dispute, without resorting to very subtle distinctions. When it comes to so nice a point as this, cannot you see the obvious danger of the eager parties perjuring themselves, if, in the absence of any *written* terms of contract, there should be occasion to supply, and parties should be permitted *orally* to supply, defective evidence? Now, look at the present case. What reason has been *assigned* by the vendee, for breaking his engagement, does not appear. What is it in his power to assign if he be put upon his defence to an action? Are we now, were we ever, in a state to sue him? Have we acted according to law? Have we neglected to observe any statutory regulations?—those, for instance, of the Statute of Frauds? Can you imagine any defence that he may be relying upon? Perhaps you will take this book into the pupil's room—(possibly Chitty on Contracts, or Smith's Mercantile Law), and having carefully perused the sections on

the 'Sale of Goods,' try to apply them to our present case." He goes and reads what is entirely new to him—but, nevertheless, if *carefully* read, by no means unintelligible. Having gained a general notion of the law bearing on this subject, he finds that his case falls within the § 17th of the Statute of Frauds, unless the payment of earnest, and the tender of the cow, coupled with the subsequent conversation, exempt it. He reads the *cases* which have been decided on that subject, as well as on others connected with it—and having come to the conclusion that the *property* in this cow was clearly vested in B, he finds himself somewhat puzzled to adjust the legal consequences of A's subsequent acts, particularly his sale of the carcass: and returns to his tutor, who briefly discusses the subject with him. 'The cow, on payment of the earnest-money, became the *PROPERTY* of B, whether A did or did not retain a lien upon it for the payment of the remainder of the purchase-money. If A *had* a right to detain the cow on the ground of lien, it cannot have parted from his possession, and been *delivered* to B; since neither an actual nor constructive delivery could have taken place, till A had divested himself of all claim, on any pretence, to the further *possession* of the cow. The contract of *bargain* and sale remains, therefore, in full force; and B is liable to an action for 'goods bargained and sold' at the suit of A, whose re-sale of the article, or rather disposal of the carcass, would not, under the circumstances, interfere with his remedy, as it clearly could not have the effect of annulling the contract.'⁴*

Having at length come to a determination on the case,

* *Maclean v. Dunn*, 4 Bing. 722.

our pupil betakes himself again to his room, draws the appropriate 'declaration,' and writes down the result of his inquiries in the shape of an *opinion*; which, when it has been, perhaps, remodelled, and adopted by his tutor, our pupil copies into a book, and devotes the remainder of the day to the subject of discussion—the bargain and sale, or sale and delivery of goods—the reciprocal rights and liabilities of the vendor and vendee of them—and the variation of those rights and liabilities by such acts of the parties as are to be found in the case proposed.

It is obvious that he has by this means gained a practical insight into a very important and difficult head of law, sufficient to guide his researches when he shall have leisure to pursue them into the ultimate grounds and reasons of the rules with which he has become acquainted, and which he has thus pleasantly applied to practice. He knows where to look, on any future occasion, for all the law of *earnest*—what constitutes acceptance, and delivery, —with reference to the Statute of Frauds; and his copy of the "opinion," in the case above mentioned, serves to connect and arrange his materials for a future exigency. Probably within a day or two, his attention is again called to this subject, by a case involving another application of the law he has collected on the subject of the *delivery* of goods—one tending equally with the former to fix in his mind the principles which regulate such transactions. With what interest and intelligence will the student enter upon the examination of such a case, for instance, as the following:—

A nobleman went into a tobacconist's shop and ordered 250*l.* worth of cigars, on terms of ready money, desiring them to be packed and sent for him to his hotel, "The

Stench," in Jermyn Street. Having sent *his own boxes* to the tobacconist's shop, for this purpose, he followed them, superintended the packing of the cigars, and *taking some of them up*, countermanded his first direction (i. e., that the goods should be sent to "The Stench"), and requested the tobacconist to keep them for a day or two, when he would call, pay for, and take them away in his cab. This, however, he failed to do; and the seller brought an action against him for the price of the cigars. Now had there been a *delivery* of them? The tobacconist thought that there had; and accordingly brought his action for "goods sold and delivered." His counsel contended that the delivery to the defendant was completed by the seller's filling the boxes furnished to him by the *buyer*, "which then became *the buyer's warehouse* for that purpose, so as to entitle the seller to payment of the ready-money price agreed upon, and to preclude him from any right to unpack them." This may be considered a striking way of putting the case—but hear the ready and decisive answer of the judge (Bayley).

"I do not assent to the proposition that the buyer's boxes are to be considered as his warehouse—and think that the seller might consider his goods as being still in his own possession. *Goodall v. Skelton** is directly in point against the seller's right to recover in this action. There, the plaintiff agreed to sell wool to the defendant, who paid earnest. The goods were packed *in cloths furnished by the defendant*, and were deposited in a building

* 2 Hen. Blackst. Reports, p. 316. This happy citation of a case exactly in point, and not even glanced at in the argument of counsel, is only one out of innumerable instances, of the prompt and accurate legal knowledge displayed by the late Mr. Justice Bayley.

belonging to the *plaintiff*, till the defendant should send for them—the plaintiff declaring that the wool should not go off his premises till he had had the money for it; and the court held that no action for goods sold and delivered would lie, for want of delivery.”*

Such are specimens, selected at random, of the current business passing under the pupil’s eye, in his pleader’s chambers: and, supposing him to feel an interest in his profession, and exhibit but moderate industry, can anything be conceived more calculated to excite his attention—to lead him easily and at once into the “art and mystery” of law—to work his own way both *into*, and *out of*, its difficulties,—to deduce accurately the principles by which its details are regulated, and fix them deeply in his mind?† “Who so valueth, or eateth with so keen a relish,” says an ancient worthy, “the fruit he buyeth of the stall-woman in a market, as that which his own hand hath gathered, after great pains, and, it may be peril, encountered in the search?” Our cow-case literally *bristles* with points of law—law which is involved in three-fourths of the most ordinary business of life, in every shade of variety, and degree of complication. Facts, such as those in the two cases above narrated, are comprehended without difficulty, and serve to *suggest* the principles by which their legal consequences are ascertained and ad-

* *Boulter v. Arnott*, 3 Tyrwh. 267; S. C. 1 C. & M. 333.

† How beautiful is the following!—“In the sciences, every one has so much as he really knows and comprehends; what he believes only, and takes upon trust, are but shreds; which, however well in the whole piece, make no considerable addition to his stock who gathers them. Such borrowed wealth, like fairy money, though it were gold in the hand from which he received it, will be but leaves and dust when it comes to use.”—*Locke on the Understanding*, Book I. c. iv. § 23.

justed: and if a little perseverance, in frequently referring to them, be but exhibited, and a spirit of further investigation cherished, the student will, it may be safely asserted, reap more solid instruction from a month of such labour, than from years of solitary reading, or attendance on the most learned lectures which can be delivered. The daily recurrence of such instances cannot fail to put him into *working* trim, to stimulate his energies, and accelerate the rapidity, of his progress. Scenes such as these are calculated to enlist, in a certain degree, his *feelings*—his self-love—as a motive and stimulus to exertion. He is anxious to acquit himself well in the sight of his tutor and fellow pupils. Emulation sets an edge upon his attention, and, as it were, chains him to his task. He feels conscious, besides, that he has entered at once upon the species of employment, which is to occupy him throughout life,—that he is every hour qualifying himself for the fit discharge of it. He learns law, by using it;—*vires acquirit eundo*. Theory thus illuminates practice, and practice, in return, developes, illustrates, and supports theory: they act and re-act upon each other.

III. While, however, so much efficacy is thus attributed to a course of chamber tuition, let us not suppose that it is unattended with disadvantages—that there is not a necessity for the student to be on his guard against contracting bad habits, such as may counterbalance much of the good unquestionably derivable from an assiduous attendance at chambers. First of all, let him never forget that the practice which he is entering upon and learning in a pleader's, conveyancer's, or equity draftsman's chambers, is *only a section of the entire legal system*. Should he be so absorbed in what is passing immediately before and around

him, as to forget THE WHOLE, in ITS PARTS, let him rely upon it that he is doing much that will require to be undone; deranging the entire scheme of his studies; and losing sight of PRINCIPLE, in petty details. "The practice of a pleader's chambers," justly observes Mr. Starkie, "is, to a certain extent, highly to be valued, as a preparatory exercise; inasmuch as it necessarily includes habits of thinking and attention, and a certain order of arrangement, governed by the different forms of judicial process: according to their arrangement the student digests his ideas, and to these he constantly refers for the solution of legal difficulties. When a doubt occurs, *he does not refer at once to general principles*. 'Let us see,' says he, 'how it would stand, if the thing were pleaded.' This technical arrangement, and mode of reference, may be frequently advantageous as an aid to memory, as well as to the reason: though undoubtedly *the solution of the case must, ultimately, depend on PRINCIPLES*, in reference to which the judicial forms and the technical process of pleading, are merely secondary and instrumental." Let the student, in every stage of his study, regard PRINCIPLES as the keystone of the arch,—or rather as the polar star: and if he find great and undiminishing difficulty in doing so, after his attention shall have been thus distinctly challenged to the necessity of it, let him seriously distrust his aptitude for the profession—or at least his capacity for rising above the dead level of mediocrity. Let him not, however, rashly come to such a dismal conclusion! but make persevering efforts to discern the clear bright light which, once discovered, will not let him be "in endless mazes lost." "There is nothing," says Mr. Starkie, "which more effectually facilitates the study of the law, than the constant habit, on the part of the stu-

dent, of attempting to trace and reduce what he learns by reading or by practice, to its appropriate *principle*. Cases apparently remote, by this means are made to illustrate and explain each other. Every additional acquisition adds strength to the principle which it supports and illustrates; and *thus* the student becomes armed with principles and conclusions of important and constant use in forensic warfare, and possesses a power, from the united support of a principle, fortified by a number of dependent cases and illustrations; whilst the desultory, non-digesting reader—the man of indexes and abridgments, is unable to bear in his mind a multiplicity of, to him, unconnected cases; and could he recollect them, would be unable to make use of them, if he failed to find one *exactly* suited to his purpose. The good fortune to meet with a case *fully* in point, is not very frequent—not without the voluminous digests of the still more voluminous reports, which, having increased to an enormous extent, are still further increasing in a fearful ratio. A case *seemingly* in point, is not to be relied on without danger, when it is considered, how frequently nice distinctions are resorted to, as an expedient for attaining justice; and that, sometimes, by a bolder course, the precedent is condemned, and overruled as untenable.”

Every one of the foregoing sentences is worthy of being pondered by the student ambitious of excellence. That distinguished philosopher, Dugald Stewart, adds the weight of his testimony in favour of the same opinion. “I am inclined to believe, both from a theoretical view of the subject, and from my own observations, as far as they have reached, that if we wish to fix the particulars of one knowledge very permanently in the memory, the most effectual way

of doing it, is to *refer them to general principles*.”* A man of average understanding, who has been early trained to the habit of this constant reference to principle, will not only find himself soon acquiring great additional knowledge, with decreasing *effort*; but *cannot go far wrong*, however suddenly, or at whatever disadvantage, he may be called upon to act in case of emergency and difficulty. How different is it with—if one may be pardoned such an expression—the *unprincipled* lawyer! The slightest unexpected difficulty—a hair’s-breadth variation from the line of *ita lex scripta*—utterly discomfits him, and develops his profound ignorance of the science of the law. We had many more observations to offer upon this head, but our space forbids it.

IV. No one can have devoted himself to the perusal of the labours of our great legal luminaries—our Cokes and Plowdens—without discovering such an extent, accuracy, and profundity of knowledge, as may be looked for, in modern days, in vain. How was it obtained? Where were *then* the elementary treatises upon, the synthetical compendia of, law with which our times are so prolific, and on which lawyers of the present day now place so much dependence? “At present,” says that legal giant of our own time, Lord Eldon,† “lawyers are made good cheap, by learning law from Blackstone, and less elegant compilers. Depend upon it, *men so bred will never be lawyers*, (though they may be barristers,) whatever they may call themselves.” That our forefathers were not entirely destitute of Treatises, Abridgments, and other assistants to legal study, is true: for the names of Glanville, Bracton, Britton, Fleta Saint

* Elements of the Phil. Hum. Mind, p. 425.

† *Ans.*, p. 392.

German, (in his Doctor and Student,) Perkins,—will at once occur to the reader as instances to the contrary. But how few are they—and at what long intervals of time—when compared with the rapidly multiplying Treatise writers of modern times! It was the incessant and systematic study of *individual cases*, both oral and written—constant attendance on the courts—and perusal of the Reports, which conduced to the formation of the legal greatness of the former sages of the law. The present enormous, and continually increasing number of Reported Cases, undoubtedly calls for aids to the modern practitioner, which were not so requisite to his predecessors: but, nevertheless, we all require to be cautioned against contracting a habit of exclusive, or mere primary, reliance upon such assistance. Able, accurate, and convenient Treatises now abound upon almost every head of law: how many persons are there who are indolently satisfied with them, and abandon the profitable labour of independent research, and with all its great direct, and incidental advantages! The author has been informed that the late Mr. Justice Bayley strenuously deprecated the perusal of Treatises, however able. “Read the *Cases*,” said he, “for yourself—and attend to the application of them, in practice.” One can hardly be expected to follow this advice, to its literal extent: but thus far it may be regarded as sound and practicable:—Treatises are useful to guide you to the Cases, which you must then examine and study for yourself; and also to methodise your researches, and afford you convenient access to their results. If our Treatises become SUBSTITUTES for the close study of the various cases of which they consist, they will form a grievous stumbling block to both students and practi-

tioners, who will become bitterly conscious of it, as soon as they are called upon to argue in open court, and are opposed to those who have not been equally foolish with themselves.

LASTLY. Let not the student be surprised or disheartened, if, for a considerable time, legal studies present to him a repulsive aspect. Let him PERSEVERE. Before steady energy and attention, "grim-visaged LAW will smooth its wrinkled front !"

"I have heard it observed," says Dugald Stewart, "that those who have risen to the greatest eminence in the profession of law, have been, in general, *such as had at first an aversion to the study.** The reason probably is, that to a mind fond of general principles, every study must be at first disgusting, which presents to it a chaos of facts apparently unconnected with each other. But this love of arrangement, if united with perserving industry, will at last conquer every difficulty,—will introduce order into what seemed, on a superficial view, a mass of confusion, and reduce the dry and uninteresting detail of positive statutes into a system comparatively luminous and beautiful."†

* The same remark occurs in a letter from Mr. Gray to his friend Mr. West. 'In the study of law the labour is long, and the elements dry and uninteresting ; nor was ever anybody (*especially those that afterwards made a figure in it*) amused, or even not disgusted, at the beginning.'

"'The famous antiquary, Spelman (says Burke), though no man was better formed for the most laborious pursuits, in the beginning deserted the study of the laws in despair—though he returned to it again, when a more confirmed age, and a strong desire of knowledge, enabled him to wrestle with every difficulty.'—Fragment on the History of the Laws of England, Burke's Works, vol. x. p. 553 (8vo ed.)."—*Addenda to vol. 1st of Stewart's Philosophy of the Human Mind*, p. 475 (6th ed.).

† *Philosophy*, vol. i. p. 475 (6th ed.).

With this consolatory paragraph, the author closes the present chapter ; hoping that it may be found to contain practical suggestions calculated to be useful to those for whom they are intended, if only by putting them upon inquiry amongst those who are better qualified to advise, than he who has here undertaken to do so. *Quot homines, tot sententiæ* ; and possibly few persons of such capacity and experience as warrant their being consulted upon the subject, may concur in all, or even the majority, of the opinions contained in this chapter : but they are the result of much observation and reflection, and communication with many of the ablest and most eminent members of the profession.

CHAPTER XV.

SPECIAL PLEADING—

ITS HISTORY, CHARACTER, AND EXCELLENCE EXAMINED
AND ILLUSTRATED.

THE sense in which the word "Pleading" is popularly understood, namely, as signifying the *oral addresses and arguments* of counsel, on behalf of their clients, in open court, has long served to mislead non-professional persons; who are still more mystified by the terms "*special pleading*" and "*special pleader*." We shall endeavour, in this chapter, to give a plain and popular, but at the same time faithful account of this most important and characteristic feature of our English jurisprudence:—of the means by which LAW is separated from FACT, and by which, in other words, the provinces of the judge, and of the jury, are kept distinct. We have, in former chapters, bestowed some pains upon the subject of *equity* pleading*; and glanced in ensuing ones† at the systems adopted in the Criminal and Ecclesiastical Courts: giving interesting specimens of all in the Appendix.‡ We have now, however, to deal with one of a much more exact and difficult nature than any of them; exhibiting, in the language of Chancellor Kent,§ a "science equally curious, logical, and

* *Ante*, chap. ix., pp. 368, *et seq.*† *Ante*, chap. xii., xiii.‡ App. pp. vi. *et seq.*; lxxxviii. *et seq.*; ciii. *et seq.* § 4 Kent, Comm. 544.

masterly;" to which we have already several times made allusion,* and which has recently been entirely remodelled by the legislature,† with the view of removing the imperfections and errors contracted during the course of ages, and securing the highest attainable degree of practical efficiency. Nor is a correct *general* knowledge of this great section of our juridical system, necessary for those only who intend to become members of the legal profession. It is discreditable to any private person, of liberal education, and superior position in society, to be totally unacquainted with the process by means of which all civil litigation, by way of action, is conducted; but in one who is, or intends, or expects to become, a member of the Legislature, such ignorance is utterly inexcusable, and also most pernicious.—Let us, then, proceed to give a plain and popular account of the system of Common Law pleading.

Whoever undertakes to administer *justice* between disputing parties, must, of course, listen fairly to both, in order that he may be enabled to acquaint himself with the merits of the case,—the real points of the controversy. But now comes the question—how ought the litigants to state their case? Verbally, or in writing?—Ought they to be allowed the utmost possible latitude, to be at liberty incessantly to interrupt one another, to introduce into their respective statements whatever topics whim, passion, or self-interest may suggest—perpetually to vary the grounds of the contest? What must be the state of the society, and what the character of the courts of judicature, which could tolerate such interminable and unseemly wrangling?—Yet are there, even in the present day, both

* *Ante*, pp. 25, 26 ; 445, 6 ; 460. † *Id.* and App. No IV, p. xxv, *et seq.*

in this country and elsewhere, persons who would contend for such a method of litigation! Suppose, however, we advance a step towards a more reasonable state of things, by making each party state his case alternately, and uninterruptedly: to say nothing of the *time* which must be wasted—are the great bulk of litigants really capable of performing such a task—of doing justice to their own cases?

“Many individuals,” said that eminent pleader, the late Mr. Chitty, in one of his most recent publications, “will be found, who insist, that, with reference to pleading, prescribed rules are wholly unnecessary; and that if parties were unshackled, they would naturally state their causes of complaint or grounds of defence, more intelligibly than in what is indiscriminately termed the present ‘jargon of pleading.’ But would it be so? Experience has established that, in all countries, though a few educated persons might be able to make a lucid statement, yet with the great mass of litigants, it would be far otherwise. Even in ordinary conversation, how few persons are clear and concise in their narratives, how many are found to *intermingle facts with arguments*, and to rely on immaterial points, so as to render their statements almost unintelligible? Some will be much too prolix and diffuse, whilst others will proceed as if their hearers were already in full possession of the facts, and will omit the communication of perhaps the most important circumstances. And few, indeed, will observe any logical order in their statements, even of simple facts: and if in such narratives perspicuity be not evinced, how great would be the confusion, if there were no rules affecting the description of complicated legal rights to personal and real property,

the varieties of which, in the progress of society, have become almost innumerable?"* Suppose, then, each party permitted thus to undertake, in his own way, the statement of his own case: what if it should turn out that their multifarious assertions and denials were directed to *different matters*—that one, or, perhaps, both of them, altogether mistook the real questions at issue? What is to be done in such a case as this? Could any court pretend to proceed, under such circumstances, to a decision? WHAT is to be decided? Would either party abide by such a decision?—Could it be satisfactory?—Where would be the end of all this?

Three methods of obviating these difficulties, have been adopted by different systems of judicature. One requires each party privately to review the conflicting statements, and select from them the points for decision, in order to ascertain and provide the requisite *evidence*—imposing, at the same time, upon the judge, the corresponding duty of examining, for his own information, the various allegations, and seeing how they are borne out by the evidence "as a matter of private discretion—neither the court, nor the parties, having any public exposition of the point in controversy to guide them—judging of it upon retrospective examination of the pleadings."† The Scottish system

* Concise View of Pl. pp. 8-9. "Even in the interior of our immense territory in India, they have long found it essential to have their regular pleaders, there called '*Vakeels*,'"—Ib. p. 9;—and see the interesting and learned note of Mr. Serjeant Stephen, tracing "the use of professional pleaders or advocates, among some of the continental nations, to a period extremely remote."—*Plead.* App. note (8), p. xiii., (5th ed.). Note.—The edition of STEPHEN ON PLEADING, referred to throughout this chapter, is the 5th (published in 1843).

† Steph. on Pl. p. 494.—The practice of our Courts of EQUITY forms no exception to this statement: for though the common Replication offers a

of judicature adopts another course. The litigants having completed their respective statements, the court itself, alone, undertakes the task of retrospective examination, in order to collect and adjust the true points in dispute, which are then publicly and officially promulgated, previous to the trial.* “Under these rival plans of procedure,” observes Mr. Serjeant Stephen, “by which the statements are allowed to be made *at large*, it becomes necessary, when the pleading is over, to analyse the whole mass of allegation, and to effect, *for the first time*, the separation of the undisputed and immaterial matter, in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders may have been allowed to indulge. It will always, therefore, be in some measure doubtful, or a point for consideration, to what extent, and in what exact sense, the allegations on one side are disputed on the other—and also to what extent the law relied upon by one of the parties, is controverted by his adversary. And this difficulty, while thus inherent

formal contradiction to the Answer (*vide ante*, p. 382)—a contradiction which imitates, in some measure, the form of a common-law issue, and borrows its name, yet, in substantive effect, the two results are quite different: since the contradiction to which the name of an “Issue” is thus given in the Equity pleading, is of the most general and indefinite kind, and develops no particular question as to the subject for decision in the cause.—*Id. ib.* (n.)

* Since the introduction into the Scotch system of judicature, of trial by jury in civil cases (originally in 1815, stat. 55 Geo. III. c. 42), it has become necessary to adopt measures for ascertaining and deciding what questions ought to be submitted to the jury, and what to the decision of the Court, and the sufficiency of the pleadings for these purposes. This was effected in 1825 by the process prescribed by stat. 6 Geo. IV. c. 120. The reader is referred to the statute, for the purpose of contrasting the English and Scotch systems of procedure, particularly with reference to the very different duties devolved by them upon the respective judges of the two countries.]

in the mode of proceeding, will be often aggravated, and present itself in a more serious form, from the natural tendency of judicial statements, when made at large, to the faults of vagueness and prolixity. For where the pleaders state their cases, in order to present the materials from which the mind of the judge is afterwards to inform itself of the point in controversy, they will, of course, be led to indulge in such amplification on either side, as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision.”*

Now, in our English system, a very different course is pursued. Its great object is to compel *the parties themselves* to come to an issue: *i. e.*, “so to plead, as to develop some question (or issue) *by the effect of their own allegations*, and to agree upon this question as the *point for decision* in the cause;—thus rendering unnecessary any retrospective operation on the pleadings, for the purpose of ascertaining the matter in controversy.”† By the natural result of a contention thus managed, “the undisputed or immaterial matter, which every controversy more or less involves, *is cleared away by the effect of the pleading itself*; and, therefore, when the allegations are finished, the essential matter for decision necessarily appears.”‡ In other words, our courts decline, as it were, to hunt for a needle in a bottle of hay, throwing that task upon those who dispute the right to the needle, when found.

“I consider the system of special pleading, which prevails in the laws of England,” said Lord Tenterden, “to be founded upon, and to be adapted to, the peculiar mode

* Steph. on Pl. 497.

† *Id.* p. 138.

‡ *Id.* p. 493.

of trial established in this country—the TRIAL BY JURY: and that its object is to bring the case, before trial, to a *simple*, and—as far as practicable—*single* question of fact; whereby, not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved that both these objects are better attained, where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him.”*

The origin of this peculiar and certainly admirable system, must be referred, in all probability, to the practice of ORAL pleading; † which, as it was universally in use among the early judicatures, ‡ certainly prevailed in this country in the reign of Henry III., and was not finally abandoned till about the middle of the reign of Edward III. The contending parties appeared actually in court, either personally or by their attorneys; and their case was stated *vivâ voce* in the presence, and under the superintendence, of the judges; who compelled the parties “so to manage their alternate allegations, as at length to arrive at *some specific point*, or matter, affirmed on the one side and denied on the other.” § This specific point was called “THE ISSUE” (*exitus*—because the parties were at

* Selby v. Bardons, 3 B. & Adol. p. 16.

† See a curious specimen from the Year Books, of *vivâ voce* pleading, in the Appendix (No. XI.).

‡ Steph. on Pl., p. 23; App. note (7).

§ Steph. on Pl., p. 24.

THE END of their pleading),* and was of two kinds—an issue *in law*, or an issue *in fact*: † being referred for decision, in the former case to the judge, in the latter to the jury. This system of oral pleading was, as already intimated, probably discontinued in the reign of Edward III. What may be termed a *paper war* was introduced in its stead, and has continued to the present day; *i. e.*, the complaining party, through the medium of his attorney and pleader, in the first instance *writes* the statement of his case, and sends it for a written answer, to the attorney and pleader ‡ of his opponent.

It will not require much reasoning to show, that the simplicity, was far outweighed by the inconveniences, of

* An *issue* is, when both the parties join upon somewhat that they refer to a trial, to make AN END of the plea (*i. e.* suit).—*Finch's Law*, Book IV. c. xxxv. p. 396.

† This phrase of *issue* occurs at the very commencement of the Year Books (*i. e.* 1 Edward II.)—but the author has not traced it to an earlier period. In some instances, the expression '*issor d'empler*' occurs; which may be translated '*to get out of*,' or '*finish the pleading*,'—and clearly marks the meaning and derivation of the term *issue*. In the reign of Edward IV. we find the Latin term thus regularly defined: *exitus idem est quod finis, sive determinatio placitandi*.—Year Book, 21 Edw. IV. 35. It is observable that the parallel word *fin* appears to have been used, in the same sense, in Normandy. See Comm. de Terr., lib. ix. c. 27.—*Steph. App. Note* (10).

‡ The terms "*issue in ley*," and "*issue en fet*," occur as early as the third year of Edw. II., *i. e.* A. D. 1309—1310. See the Year Book, 3 Ed. II. 59.—*Steph. App. Note* (10).

§ The term itself has occasioned no little misunderstanding. "*Plee*," in French—in English, *plea*—were anciently used to signify *suit*, or *action*. While used in this sense, they gave rise, respectively, to the words *pléder* and *to plead*; of which the primary meaning was, accordingly, *to litigate*, but which, in the later English law, have been taken in the more limited sense of MAKING ALLEGATION IN A CAUSE. Hence the name of that science of '*Pleading*,' to which this work relates. This variable word," continues Mr. Serjeant Stephen, "has, indeed, still another and more popular use, importing the forensic *argument* in a cause; but it is not so employed by the profession."—*Steph. on Pl.*, App. Note (1).

our earlier method of conducting litigation; and that the infinitely more numerous and complicated questions which give rise to modern litigation, rendered imperative the adoption of a much more deliberate and accurate adjustment of the matters in dispute. Settled forms of statement were gradually introduced;* rules calculated to insure precision, perspicuity, and other important objects, were from time to time prescribed by the judges,† who required a rigid adherence to them: and thus, by the experience of centuries, special pleading has been moulded into a science—a great and admirable science—to the development of which have been devoted the anxious attentions of some of the subtlest intellects, the most learned men, that any country has produced. Consider the extraordinary difficulties through which such a system must have laboured: the pleader of each party under varying states of the law, straining every nerve, taxing his experience and astuteness to the uttermost, in order to

* “*Policrates*. . . Why, if your position is true, cannot a plain just narrative of the circumstances of fact, be sufficient of itself; and the bare state of the case, be its own form? *Eunomus*.—This might do very well for the few who are endowed with uncommon good sense; but it is not the easiest and most direct way for the generality of people, who would never be able to tell their own story on record, in a small compass. *Forms*, of some sort, are the consequence of anything becoming an art. What do we mean by ‘an art,’ but a collection of certain rules for doing anything in a set form!—I will add, too, that these forms are more concise and convenient in themselves, than any one general form can be.”—*Wynne’s Eun.* pp. 498–499.

† See Steph. on Pl. App. Note (38). The judges, as we have seen (*ante*, pp. 25, 459, *et seq.*), were expressly empowered by the legislature to frame such rules (3 & 4 Will. IV. c. 42, § 1, continued by stat. 1 & 2 Vict. c. 100, from the 1st June, 1833, to the 1st November, 1843). The first-mentioned statute recites the probability of doubts arising as to the powers of the judges to alter the rules of pleading, without the authority of Parliament. See the *New Rules*, given at length in the Appendix (No. IV.), pp. xxv—xlxiii.

secure his client the advantage,—often misleading and bewildering both pleaders and judges;—the scope afforded, for this purpose, by the prodigious variety and complexity of legal rights, wrongs, and remedies ! The wonder is, surely, under such circumstances—not that such a system should have many and glaring faults—(and serious faults it has in even its present improved form)—that it should not unfrequently have afforded an opportunity of defeating the ends of justice, but that, struggling through so many obstacles, it should ever have been capable of reduction to a science, such as it unquestionably is,—a science, too, so eminently calculated, as it has proved itself, to answer the ends of distributive justice. It certainly is not, nor ever was, and probably never will be, a *popular* system. Few have been so unsparingly, so violently, exclaimed against. Its subtlety—its abstruseness—its complicated technicality—its fictions—its delays—have been a thousand times execrated, in the bitterest terms : but, chiefly, by whom ? By those of the public who fancy themselves to have been its *victims* ; and also by indolent and superficial students. It is, undoubtedly, a system very difficult to be understood and appreciated : and so, surely, are logic, metaphysics, mathematics. The technical terms ‘colour,’ ‘new assignment,’ ‘negative-pregnant,’ ‘certainty to a common intent,’ ‘*absque hoc*,’ ‘departure,’ ‘duplicity,’ ‘de injuria,’ &c. &c., used by the pleader, ought surely to be no more exclaimed against than the ‘sub-contraries,’ ‘subalterns,’ ‘differentia,’ ‘non-distribution,’ ‘enthymeme,’ ‘sorites,’ ‘ostensive reduction,’ &c. &c. of the logician, or the technicalities of the algebraist or metaphysician.* The true

* “ My academical readers will excuse me for suggesting,” says Blackstone, that the terms of the law are not more numerous, more uncouth, or

reason why *one* science is so exclaimed against, on grounds really applicable to them all, is, that the mysteries of special pleading *are brought to bear directly upon the actual business of life*; they affect the dearest interests of men,—their property, life, and character—"coming home to their very businesses and bosoms,"—they tell upon the pocket.—"As few individuals relish physic, although it may restore them to health, so I will not anticipate," says Mr. Chitty, "that any one will be enamoured with the supposed beauties of special pleading, or indeed any other part of the machinery of a cause, antecedent to the trial of their rights. But all sensible individuals will admit, that as physic may be essential for the cure of diseases, so are legal forms essential in the due administration of justice; and we ought to be satisfied, provided the most salubrious remedy be adopted in the one case, and the other."* Special pleading is, in short, a peculiarly *practical*, as most others are merely speculative sciences. Every science will be railed against by the mass of mankind, in proportion as it is hostilely brought home to them—especially if, as in the case of special pleading, they are compelled to resort to it on all occasions, from matters the most minute to those the most momentous; interfering, as it does, with their most selfish interests, calling into action every feeling, every passion, which can excite and agitate the human breast. If algebra and geometry were but placed in the situation of

more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy; nay, even of the politer arts of architecture, and its kindred studies, or the science of rhetoric itself. The law, therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence."—3 Bla. Com. 321, 322.

* Conc. View of Pl. p. 7.

special pleading, they would, no doubt, be quite as vehemently exclaimed against; geese would be found to cackle against them, as now against special pleading—an algebraist, geometrician, and pleader would be equally disliked and ridiculed.”* That, in the lapse of ages, abuses crept into the science of pleading; that its primitive simplicity of structure and true objects were frequently lost sight of—that some of its learned, ingenious, but short-sighted professors invested it with a needless subtlety and obscurity,† and occasionally expanded it into a most preposterous prolixity, cannot be denied. These errors and defects, however, have been grossly exaggerated; by those, chiefly, whose impetuosity and violence would overleap all the barriers imposed by the rules and orders of civilised society, between them and the gratification of their caprice and vindictiveness. God forbid, however, that law should ever become so cheap and ready of access, as that every foolish and violent applicant may have instant recourse to it, flinging “fire-brands, arrows, and death” all around him.‡ Rather, surely, would a sober and rational member

* “Do you, sir,” said Dr. Johnson, sternly, to a simpleton who was abusing the study of the law—“Do you, sir, find fault with that study which is the last effort of human intelligence, acting upon human experience !”

† “Here,” says a truly whimsical and splenetic, but learned annotator upon Lutwyche’s Reports, “Here the common lawyer may learn how difficult it is to plead either a custom or a prescription, without as many exceptions to it, as there are words in either: here we may see what artificial fencing there is between replications and rejoinders, till an end is put to the strife by some general or special demurrer—and abundance more of such cob-web subtleties, spun so very fine by the spiders of the law, that one would think it done on purpose to let justice fall through.”—*Lutwyche’s Rep.* by W. Nelson, of the Middle Temple, Esq., Pref. iv. (1718.)

‡ “Law may be had too cheap,” said the present Chief Justice of the Common Pleas (Sir Nicholas Conyngham Tindal), when in Parliament, “and then it becomes an unmitigated evil.” After supposing the revenue

of society, applaud the boundaries which our laws have erected—would look indulgently upon the necessary imperfections of a system which opposes a series of barriers in the way of brutal force and arbitrary will, and secures a rigorously exact and dispassionate investigation of all the rights, liabilities, and injuries which the intercourse of mankind are constantly bringing into dispute.

It may be safely said that those have been the warmest panegyrists of special pleading, who have been best acquainted with its principles and details. Hear the venerable Littleton !

“ Know, my son, that it is one of the most honourable, laudable, and profitable things in our law to have the science of well pleading, in actions reals and personals ; and therefore I counsaile thee especially to employ thy courage and care to learne this.”*

His illustrious commentator, Lord Coke, loses no opportunity of lauding it.

“ Good pleading is *Lapis Lydius*—the touchstone of the true sense and knowledge of the common law.”

“ Usual pleading is the *sure oracle* of the law.” “ One of the best arguments, or proofs in law, is drawn from the

to become capable of affording justice gratuitously, he proceeded :—“ Then every man's hand would be raised against his neighbour ; no fancied grievance would be allowed to sink into oblivion ; no paltry assault, no petty trespass, would be either forgiven or forgotten, and the courts would be occupied with the endless quarrels of the peevish and the discontented. It therefore operates as a wholesome check on the spirit of litigation, that there should be in law a dearneess commensurate with the exigency which requires an appeal to it, a dearneess which, while it does not check individuals in the pursuit of a real right, or impede them in gaining satisfaction for an injury inflicted, is much more beneficial to society than a cheapness which places it within the reach of every vindictive and malicious spirit.”—*Hans. Parl. Deb.* N.S. 18th vol. p. 851 ; and *Mirror of Parl.*, vol. i. p. 436.

* Tenures, § 534.

right entries, or course of pleading; for the law itself speaketh by good pleading—and therefore Littleton here saith 'it is proved by the pleading,' &c.—as if pleading were *ipsius legis viva vox*."*

The celebrated Sir William Jones speaks of it in the following terms of elegant eulogy.

"The science of special pleading is an excellent logic; it is admirably calculated for the purpose of analysing a cause—of extracting, like the roots of an equation, the three points in dispute, and referring them, with all imaginable distinctness, to the court or jury. It is reducible to the strictest rules of pure dialectics, and tends to fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding."†

"The substantial rules of pleading," says Lord Mansfield, "are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained; though, by being misunderstood, and misapplied, they are often made use of as instruments of chicane."‡ "I have heard it remarked by a gentleman alike distinguished by his philosophical and professional attainments," says Dr. Woodeson, alluding, probably, to the distinguished individual whose sentiments have been already quoted (Sir W. Jones), "that he thought special pleading was the best logic in the world, next to mathematics."§ And let it not be imagined that this eulogium

* The Case of Sutton's Hospital, 10 Co. Rep. 29 a; Litt. 170; Co. Litt. 115 b.

† Prefatory Discourse to the Speeches of Isæus.—Works, vol. iv. p. 34.

‡ Robinson v. Rayley, 1 Burr. 319.

§ Woodeson's Lectures, xliv. note (*).

is now no longer just. It is far more so than ever, since the recent rules have reduced pleadings to—it may be said—a perilous degree of compression and exactitude.

To these high authorities—selected out of a “cloud of witnesses,” may be added that of Mr. Rites.

“Special pleading,” he observes, “is, in fact, only another name for that sort of logical discussion of the subject of complaint, or controversy, which enables the court and the jury to discover at one view the number and nature of the precise points in dispute, upon which the parties are at issue. That we have usually, indeed, so much seeming obscurity to contend with—at least upon our commencement of this course of study, is a natural consequence, not of the want of evidence in things, *but of the defect of preparation in ourselves*; and more particularly of our not being conversant in the meaning of the *terms of art* which experience has shown to be necessary for the sake of certainty, brevity, and convenient precision.”

“The science of special pleading is not more difficult to be explained by a teacher, than the science of rhetoric itself. *Having succeeded in fairly and distinctly understanding the terms of art*, we are enabled to perceive, in a short time, and with very little labour, that the various doctrines and rules of pleading are demonstrable upon the principles on which they were originally suggested, of plain reason, and common intendment; and that they have usually no further authority in practice, than in proportion as they are calculated to promote the ends of substantial justice, whether by guarding against surprise, by preventing confusion, by saving time to the court and jury, or by defeating the subterfuges of the dishonest dis-

putant, and compelling him to come to an issue upon the precise points in issue between the parties.”*

Practically, then, what is pleading? In the language of one of its greatest masters, the late Mr. Justice Buller, it is, “the statement, in logical and legal form, of the **FACTS** constituting the plaintiff’s cause of action, and the defendant’s ground of defence—the formal mode of alleging that on the record, which would be the support, or the defence, of the party, in evidence.† “It is one of the first principles of pleading,” says the same great authority, elsewhere,‡ “that there is occasion to state only **FACTS**, which must be done for the purpose of informing the court (whose duty it is to declare the *law* arising upon those facts), and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it.” The pleadings are, in short, a series of alternate assertions and denials—all superfluous and irrelevant matter being thrown off at each stage of this exhaustive process, as it may be termed, till the exact point of difference—the very apple of dis-

* *Introd. &c.* p. 184.

† *Vide ante*, p. 369; *Reed v. Brookman*, 3 T. R. 159. “By pleading,” says Wynne, “I shall understand the entire structure of a record; comprehending as well the plaintiff’s cause of demand, suited to the nature of the action and the circumstances of his case, as the proper answer of the defendant, to destroy that demand: with the subsequent steps arising from them, till the record is brought to some issue, either of law or fact.”—*Eunomus*, p. 198.

‡ *The King v. Lyme Regis*, Doug. 159. And see the observations of Lord Chief Justice de Grey, in *Rex v. Horne*, Cowp. 682, 683. For an interesting account of the origin and progress of pleading, see Reeve’s *History of the Common Law*, vol. iii. p. 424, and Hale’s *History of the Common Law*, p. 173; and for a brief and clear outline of the modern system (but anterior to its recent remodelling), see Woodeson’s *Lectures*, Lect. xlv.

cord—is developed. There is no room, in this exquisite system, for confusion, for excitement, for exaggeration, for misrepresentation, or concealment. Whatever be the exasperating circumstances attending the cause of action, the statements of each party must be given and adjusted with all the frigid precision and method of a mathematical demonstration—the sole end being,

justum secernere iniquo.

Let us take a familiar instance. Suppose that a landlord and his tenant have got to high words about some broken windows. They cannot settle their dispute together, and therefore apply to the law to settle it for them. Let us but imagine each of them to be blessed with the rare faculty of *coming to the point*—of stating his case in a plain straight-forward way, and 'tis the easiest and pleasantest thing possible. Come forward, then, landlord and tenant, and tell us all that is in your hearts towards each other !

Landlord.—I let that man a house for seven years, and he agreed to leave it in good repair when the time was up. He has left the premises, however, with twelve broken windows ; for which I demand 3*l*.

Tenant.—I own I left the windows broken, but my landlord *forgave* me, by this deed here [of release].

Landlord.—That deed is mere waste paper ; being obtained from me by duress [*i. e.* illegal constraint].

Tenant.—It was given voluntarily ; and I will go before a jury upon it.

Landlord.—So will I.

THEREFORE, let a jury come, says the court, to try this matter between the parties.

Here is a "round unvarnished tale!" Here is short work for the jury!* Are not these two most exemplary disputants? Can anything be more direct, and simple? Let us now, however, put the matter into the hands of the law; let us submit the facts to the pleader,—and see what is the exact nature of his operation upon them.—Our landlord goes, in the first instance, to his attorney, and tells him the facts in his own way. The attorney reduces his statement into writing, and sends it as "instructions" to his pleader, to put them into due legal form: *i. e.*, to state all the necessary facts, and no more, in the precise and settled language of the law—and who is said, in doing this, to draw the DECLARATION, *i. e.*, the plaintiff's "statement of his cause of action—of the nature

* The following curious specimen of pleadings among the Lombards, as preserved in a compilation of undoubted authenticity, may be said to exhibit the utmost degree of brevity imaginable:—

M.—Petre, te appellat Martinus, quod tu, malo ordine (i. e. injuste) tenes terram in tali loco positam.

P.—Illa terra mea propria est, per successionem patris mei.

M.—Non debes ei succedere, quia habuit te ex sua ancillâ.

P.—Vere—sed fecit eam widerbora (i. e. liberam) sicut est edictum, et tulit ad uxorem.

—Approbet ita, aut amittat.—*Leg. Longob. ap. Mur. Leg. Liutpran. lib. vi. 53. See Steph. App. note (40).*

One other instance may be given, very similar, in subject, to that in the text:—

M.—Petre, te appellat Martinus, quod tu tenes, malo ordine, terram in tali loco.

P.—Ipse terra mea propria est, per chartam quam tu me fecisti—et ecce chartam.

M.—Ego feci istam chartam, sed per virtutem (i. e. vim).

P.—Non fecisti.

M.—Vis ei probare!

P.—Volo.—Vadate pugnam."

These were the pleadings of the barbarous Lombards.

and quality of his case.” It commences thus (*Vide ante*, pp. 369, *et seq.*)—

“ In the Common Pleas.

“ On the 1st day of July, 1845.

Middlesex to wit.—A. B. complains of C. D., who has been summoned to answer him in an action of covenant.”

It goes on to state that a lease was made between the parties (offering it to the court, to be inspected; from which the pleader selects all that is necessary for his purpose, *i. e.*, the terms of the letting to the tenant, and his “covenant” *to repair*. So much for the lease. He then states shortly, that the tenant entered into the premises, and continued there till the end of the term; that the landlord did all that he agreed to do, but not so the tenant: for he quitted the premises, and left the windows broken: so not having kept his covenant, and having occasioned damage to the landlord, to the amount of 10*l.*, “and therefore he brings suit,” &c.*

Now could the pleader state less, need he have stated more, than this? What has he done, but mention the parties appealing to the court, the contract they entered into, the breach of that contract, and the injury thereby occasioned? Let it be borne in mind that the *parties themselves* may be so well acquainted with the whole transaction, as to require

* “*Et inde producit sectam*” [a sequendo]. This form was originally used to signify the witnesses, or *followers* (sectores), of the plaintiff: for in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case, by tendering the testimony of the *secta*; but the actual production of the “suit,”—the *secta*,—or followers, is now antiquated, though the form of it is still retained. Perhaps in the spirit of conciseness evinced in the New Rules of Pleading, this superfluous phrase might have been discarded. See 3 Bla. Com. 295; Gilb. C. P. 48; Steph. on Pl. 474; 1 Chitt. Pl. 436, (7th ed.).

little or no recital of circumstances; but how is a *third party*, an utter stranger, to be put on a footing with them, in order to decide fairly? "For," to adopt the language of an elegant writer, "in suing, either for a right detained, or a wrong committed, the plaintiff is to recover by his own strength, and not by the defendant's weakness. And if, in point of prudence, as well as justice, he ought to demand no more than he can prove; in point of general convenience, he ought to demand it with that certainty and precision which may enable the defendant to answer the demand—and a third person, an entire stranger to both, sitting in a court of justice, to judge between them. This, I take it, is the essence of a 'declaration,' in the abstract; it is common to every form, and without which no form of a declaration is perfect. And though the wisdom of the law has invented different forms of actions for the recovery of different rights, you will find that the substantial part of any 'declaration' is, as to its great outlines, what any person of good sense would most probably put together, in a demand of that nature."* In short, as observed by Lord Chief Justice De Grey, and Mr. Justice Buller, the great object and use of pleadings are the appropriate statement of *facts*, as contra-distinguished from the statement of mere *evidence* tending to establish the existence of such facts, or of argument, or legal deduction, conclusion, or result; in order that the adversary may be fully informed what *FACTS* are intended to be relied upon by his opponent, and thereby have an opportunity either to deny the plaintiff's allegations, or to state such new facts as he may consider will obviate or repel the legal effect of those alleged by his opponent; and *be prepared with evidence* either to con-

* Wynne's *Eunomus*, p. 198.

NEW facts, which obviate or repel their legal effect. In the first case, the defendant is said to TRAVERSE—[i. e., to deny, by way of *express contradiction*, in terms of the allegation traversed]—the matter of the declaration; in the latter, to CONFESS, and AVOID it. Pleas in Bar are consequently divided into those by way of traverse, and those by way of confession and avoidance.”*

* The following Analytical Table of the Defences to ACTIONS on SIMPLE CONTRACTS, and which are in the main essentially the same in Special Contracts (as to the distinction between them see *ante*, pp. 475, *et seq.*), is taken from the last edition (the 7th) of Chitty's Pleading, and is worthy of the repeated examination of the student.

1st.—DENT that there EVER was a CAUSE OF ACTION.

1st.—Deny that a SUFFICIENT contract was ever made.

1st.—That no contract was *in fact* made.

2dly.—Incompetency of plaintiff to be contracted with.

Plaintiff an alien enemy at time of contract.

3dly.—Defendant incapable of contracting:—through,

1st.—Infancy.

2dly.—Lunacy, Drunkenness, &c.

3dly.—Coverture.

4thly.—Duress.

4thly.—Insufficiency of consideration.

1st.—Inadequacy of consideration.

2dly.—Illegality of consideration.

1st.—At common law.

2d.—By different statutes.

5thly.—Contract obtained by *Fraud*.

6thly.—The act to be done, illegal or impossible.

7thly.—The form of the contract insufficient.

1st.—At common law.

2nd.—By Statute.

2dly.—Admit a SUFFICIENT CONTRACT, but show that BEFORE BREACH there was

1st.—A release.

2dly.—Parol discharge.

3dly.—Alteration in terms of contract, by consent.

4thly.—Nonperformance by plaintiff of a condition precedent [*ante*, p. 488 (n.)] alteration, &c.

5thly.—Performance, payment, &c.

6thly.—Contract, since it was made, become illegal or impossible to perform.

Our tenant cannot, however, deny that he executed the lease, containing such a covenant as is set forth in the declaration—or that he has been guilty of such a breach of the covenant as is there alleged; and is therefore unable to *traverse*. Can he then plead by way of confession and avoidance?—*i. e.*, admitting everything in the declaration, bring forward *new matter*, to nullify its effect? Yes—for the plaintiff has discharged him from all liability, by a deed of release, the substance of which he sets forth in his PLEA, and concludes by saying that he is “ready to verify” what he says. This is immediately delivered by the defendant’s attorney, to the plaintiff’s attorney; who, on inquiry of his client as to the real state of the facts, lays the plea

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- 2dly.—ADMIT that there WAS ONCE a CAUSE OF ACTION, but AVOID it by showing SUBSEQUENT, or other matter.
- 1st.—Plaintiff *no longer* entitled to sue.
 - 1st.—Alien enemy. [*Vide* Harman and others v. Kingston, 3 Camp. 153.
 - 2dly.—Attainted.
 - 3dly.—Outlaw.
 - 4thly.—A bankrupt, insolvent debtor, &c.
 - 2dly.—Defendant *no longer* liable to be sued.
 - 1st.—A certificated bankrupt.
 - 2dly.—An insolvent debtor.
 - 3dly.—Debt recoverable only in a Court of Conscience (*ante*, p. 519).
 - 4thly.—Cause of action DISCHARGED.
 - 1st.—By payment.
 - 2dly.—Accord and satisfaction.
 - 3dly.—Foreign attachment.
 - 4thly.—Tender.
 - 5thly.—Account stated, and a negotiable security taken by plaintiff.
 - 6thly.—Arbitrament.
 - 7thly.—Former recovery.
 - 8thly.—Higher security given.
 - 9thly.—A release.
 - 10thly.—Statute of limitations.
 - 11thly.—Set-off.
 - 5thly.—Pleas by Executors, &c.

before his pleader, accompanied with a statement of the circumstances under which this said deed of release was obtained—namely, that the defendant inveigled the plaintiff to his house, where the deed of release was lying ready prepared, and compelled him to execute it, by threats of personal violence and imprisonment, which the law calls “duress.” This fact, accordingly, the plaintiff’s pleader states as a complete answer to the plea: it is called his **REPLICATION**, and, as well as the plea, is not a traverse, but a confession and avoidance. This document is forthwith forwarded to the defendant’s pleader. Now, the first consideration which strikes him is,—supposing the fact to be as stated—is it, *in point of law*, a valid answer to the plea? He examines into the point, and finds that it *is* a good answer in law; had it been bad, he would instantly have said so, and cut short the pleadings, by referring it, in the shape of a demurrer, to the judge, whose exclusive province, as we may recollect, it is, and always was, to judge of matters of law.* He is instructed, however, that the replication is wholly false in fact—that the release was obtained fairly. What can he do, but say so? He meets the plaintiff’s assertion, therefore, of duress, with a point-blank denial—a *traverse*—which is called his **REJOINDER**, (concluding to the country—*i. e.*, to the jury, by saying, “and of this the said defendant puts himself upon the country,”) and is despatched, as such, to the plaintiff’s pleader. All *he* can do, is to add a short form called a “**JOINDER IN ISSUE**,” [or *similiter*—*i. e.*, “and the said plaintiff doth the like,”] and the pleading is at an end.†

* *Ante*, p. 515.

† The pleadings in such a case are given at length in the Appendix, pp. lxi—lxiv.

The whole is then fairly and accurately copied out on paper,—a transcript forwarded to the judge of Nisi Prius, to inform him of the nature of the cause,*—and each party knows that all he will have to do, at the trial, will be to prove, or disprove, the single fact of “duress.” “The structure of a record, raised on these foundations, is not less solid than the demonstration of a proposition in Euclid; and pleading, formed on these maxims, is not only matter of *science*, but, perhaps, affords some of the best specimens of strict genuine logic.”† Let us, however, ask,—is not all this common, or rather *good*, sense? What method can be so well adapted as this, to get at the real merits of a case—judging each party “out of his own mouth,” and securing the speedy, accurate, and dispassionate investigation of a court of Law? Look, for a moment, at the delay, expense, and trouble which are saved by this admirable method of procedure. The landlord is saved from bringing witnesses to prove the execution of the lease, or that the covenant was in fact broken, because the tenant has been compelled to admit those facts, and rest his defence on the deed of release, being, in his turn, saved the trouble and expense of proving the fact of the execution, &c., of his release; because his landlord has been obliged to acknowledge that in point of fact such an instrument was executed, and to rely entirely on the illegality of the circumstances under which it was obtained. The *status quo* of matters is, in short, exactly this: “I own I must pay,” says the tenant, “but for this release”—“and I,” replies the landlord, “admit that I must fail, unless I can impeach its validity.”

* See the form of the record prescribed by the New Rules, in the Appendix, pp. xxxix—xliii.

† Wynne's *Eunomus*, p. 204.

“The jury are to take no matter into consideration but *the question in issue*, for it is to try the issue, and that only, that they are summoned.”*

This, then, is SPECIAL PLEADING—such the series of “allegations of fact, mutually made on either side, by which the Court receives information of the nature of the controversy;” thus have the parties, each dislodging the other from his last position, alternately driven one another along till they have arrived, at length, “at some specific point, or matter, affirmed on the one side, and denied on the other.” And is not this, or rather ought it not to be the case, with *every* well-conducted controversy?† “If the manner of coming to an issue,” says Mr. Serjeant Stephen, in one of his many interesting and valuable notes, in the appendix to his Treatise on Pleading, “be considered in a view to its *abstract* principle, it will be found to consist in an application of that analytical process by which the mind, even in the private consideration of *any* controversy, arrives at the development of the question in dispute. For this purpose, it is always necessary to distribute the mass of matter into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained. This ranks, in the present day, among those ordinary logical operations which it is easier to practise than to define, and which it would be superfluous to attempt to reduce to scientific rule. It was, however, as applied to the purpose of forensic disputation, a very favourite topic with the ancient writers on dialectics and rhetoric; and there was no subject connected with these sciences on which

* Steph. Pl. p. 91.

† See the famous theological controversy between Chillingworth and his opponent, *ante*, pp. 220, *et seq.*

they bestowed more elaborate attention. '*Status excogitandi*,' says Sigonius, 'atque eo probationes omnes conferendi, artificium, in libris oratoris, multis verbis est demonstratum; neque enim in aliis præceptis antiqui rhetores, tam Græci quam Latini, plus studii aut operis consumpserunt*.' The *question in controversy* is described, among these writers, by the different terms '*κρινόμενον*'—'*summa quæstio*'—'*res de quâ agitur*'—'*quæstio ex quâ causa nascitur*'—'*judicatio*'—and others of similar import, all expressive of the same general idea, though slightly distinguished from each other in their particular application. When this question was developed, there was said to be a *status*, or *constitutio*, *causæ*. Of these '*status*' there were many classes, according to the different kinds of questions that might arise, involving not only the distinction recognised in our pleading, between questions of *fact* and of *law* [*status conjecturales, et legales*], but many additional distributions into *status finitivæ*, *translativæ*, and many others, corresponding with the various logical divisions under which the different subjects of civil dispute may be considered. As a specimen of this obsolete but curious learning, and, at the same time, as the best illustration of what is the natural progress of the mind, in effecting that development of which we have spoken, the following passage of Quintilian deserves attention :—

* * "In all forensic controversies, I took care, in the first place, to inform myself of all the different matters involved in the cause. * * After thus placing the whole matter of the controversy distinctly in my view, it was my habit to *analyse* it, as well on the part of my adversary as on my own. And first, I applied myself to that which,

* Car. Sigon. de Judiciis. See also Quintil. lib. iii. c. 6; Cic. in Topic. c. 25; Ger. Vossius Instit. Orat.

though easily described, requires a peculiarly attentive performance—I mean, I ascertained what case it was the object of either party to make, and by what allegations such cases might be respectively supported. With this view I began by considering what might be alleged by the plaintiff. This statement would necessarily be either admitted or denied on the part of the defendant. If admitted, no question could, at that stage, arise. I therefore proceeded to consider what would be the defendant's answer; and to this I applied the same dilemma, of admission or denial, by the plaintiff. Accordingly, sometimes the matter of the answer would be admitted, but, at all events, *there would, at some period of the process, arise a contradiction between the parties*, and it is then that the question in the cause is first ascertained. For example:—

“ ‘You killed such a man.’ Admitted. We proceed. The defendant must now assign some reason for this act.

“ ‘It was lawful to kill him, as surprised in adultery with my wife.’ There is no doubt of the law; we must, therefore, seek in some other point the subject of contention.

“ ‘The parties surprised were not committing adultery.

“ ‘They were.’

“ This, then, is the question, and it is a question of fact. In some cases, however, there might be a further admission.

“ ‘They were in adultery, but you had no right to kill him; for you were an exile, and infamous person.’ And here arises a question of law. If, on the other hand, to the first allegation,—‘You killed,’ it had been answered, ‘I did not kill,’ the question had been ascertained at the outset. By this kind of process is the matter in dispute, or main question in the cause, to be investigated.”*

* Quinet. lib. vi. vii. c. 1.

"This oratorical analysis of Quintilian," proceeds Serjeant Stephen, "exhibits exactly the principle of the English pleading; and when it is considered that the logic and rhetoric of antiquity were the favourite studies of the age in which that science was principally cultivated, and that the judges and pleaders were, doubtless, men of general learning, according to the fashion of their times—it is, perhaps, not improbable, that the method of developing the point in controversy, was improved from these ancient sources. On the other hand, however, it seems not to have been wholly derived from them; for the same method will appear to have been substantially in the possession of the barbarous Franks and Lombards, with whom it was, presumably, a native invention. "Whatever merit," says Gibbon,* "may be discovered in the laws of the Lombards, they are the genuine fruit of the reason of the barbarians, who never admitted the bishops of Italy to a seat in their legislative councils.†

We have, in the preceding pages, confined ourselves principally to the illustration of that one simple and efficient process, by which a question of disputed *fact* is agreed upon by the litigants to be submitted to a jury, and brought before them for that purpose, in due form: only incidentally noticing the method of eliminating the law of a case, and submitting it for the decision of the judges, by demurrer. There are, however, other modes of doing so, to which we cannot here do more than allude. Let us first of all premise, that the series of alternate allegations of fact, by which an issue is ultimately raised for the jury, never in practice extends beyond *seven*: viz., DECLARATION, PLEA, REPLICATION, REJOINDER, SURRE-

* Dec. and Fall, &c., vol. viii. p. 157.

† Steph. Pl. App. Note (23), pp. xxxi—xxxv.

JOINDER, REBUTTER, and SURREBUTTER: after this last stage the pleadings have no distinctive names. By rigorously adhering to the process of demurrer, or pleading by way of denial, or confession and avoidance, the parties *must* be brought, eventually, to a simple *denial* of matter of *fact*, or of matter of *law*: for as no case can involve an inexhaustible store of *new relevant* matter, there must be somewhere a limit to the process of pleading by way of confession and avoidance.* At every one of the seven stages above-mentioned, a demurrer may stop any further progress in *pleading*, and send the parties direct to the court. But an astute and cautious pleader may frequently choose to pass by, for the while, a fatal blunder in point of law, committed by his opponent: resolving, so to speak, to have two strings to his bow; by taking the chance of his opponent's being *unable to prove* the matter of fact which he has alleged; and if he *should* succeed in such proof, then rendering his success utterly unavailing in point of law.† Let us imagine a case in which the parties shall get up to the point of a surrebutter—*i. e.*, two or three stages further on, than did our litigant landlord and tenant, in a former page. *Declaration.* Trespass for turning the plaintiff out of his field. *Plea.* That the field was the freehold property of the defendant. *Replication.* That the defendant had let it to the plaintiff from year to year. *Rejoinder.* That the defendant determined the tenancy by a notice to quit. *Surrejoinder.* That the defendant agreed to waive the notice, on condition that the plaintiff would plant fifty oak trees on the field; and that the plaintiff was about to do so, but the defendant prevented

* Steph. on Pl. p. 66.

† Adopting the sagacious suggestion of Sir Edward Coke, in *Lord Cromwell's Case*, 4 Rep. 14 a.

him. *Rebutter*. That the plaintiff was planting them at an improper season, which would have prevented the growth of the trees. *Surrebutter*. That the season was a proper one for planting oak trees.—This series is protracted even beyond the proposed limit, viz., a surrebutter: for it is necessary that the defendant should *join issue* upon the surrebutter. Now here is a case in which the parties have drifted far away from their original position; and the sole question to be tried will be, whether or not the season was one proper, or improper, for planting oak trees. But suppose that there should be a substantial defect in the mode of stating the case, not “*cured*”—as the phrase is—by either the subsequent pleading, or by the verdict, whichever way it may go; or that the facts, however well pleaded, are essentially insufficient in law. Suppose a notice to quit *cannot* be waived when once given;* or that the defendant had no right to prevent the plaintiff from planting at any season he pleased; what will be the use of a verdict establishing the *fact* of the alleged waiver; or that the plaintiff was planting at an improper season? Here the defendant has proved that, as alleged in his rejoinder, he lawfully determined the plaintiff's tenancy, and thereby shown that the plaintiff had no right of action against him. All the rest of the proceedings, therefore, will have gone for nothing. In the next term after the trial, he will obtain the decision of the *court* upon the legal sufficiency of the surrejoinder, by

* A notice to quit may, of course, be waived. It will be an interesting test of the pupil's progress, to read over the case suggested in the text, at the commencement of his pleading studies—and again, after he shall have become moderately familiar with pleading. On the latter occasion he may form an opinion as to the legal sufficiency of the above course of pleading, different from that which he formed on the previous consideration of it.

moving in arrest of that judgment which would otherwise be given as a matter of course for the plaintiff. He might have demurred—but perhaps did not feel confident of being right in point of law; and believed also that the plaintiff could not prove the agreement of waiver which he had alleged.—There are various other ways in which facts, pregnant with disputed *law*, may be withdrawn, by the operation of pleading, from the jury, and brought before the court for its decision of the law. The parties may agree upon the facts, and have them stated in the shape of a Special Case, either before, or at the trial; or by a Special Verdict. In addition to this, a Bill of Exception may be tendered to the judge; or a Demurrer to Evidence may be offered;—(the precise effect of which last step is, to take from the jury and refer to the court, the application of the law to the fact*) and certain other steps taken with the same view, which we need not here particularise.

Such is a faint sketch of the existing system of special pleading, upon the reform and remodelling of which, has been bestowed, during the last fifteen years, the anxious and profound consideration of some of the ablest and most experienced legal intellects which were ever addressed to such an undertaking, or concerned in the practice or administration of the law. Their alterations were bold and extensive, and perhaps may be said to have been, to the same extent, successful. The principal objects proposed to be effected by the late changes were enumerated in an early part of this work,† where also was given a

* Tidd, p. 862 (9th ed.). This last mode of proceeding, however, is obsolete, for an obvious reason—viz., that if there were *any* evidence to go to the jury, the demurring party would fail, and consequently dare not run so serious a risk.

† *Ante*, pp. 20, *et seq.*

general account of all the late changes effected in the department of Common Law pleading and practice. To this we now refer the reader; and also to the Appendix (No. IV.), where will be found, *in extenso*, the Rules of Court by which these great alterations were effected. While the principal objects of the framers of them have been accomplished, by effecting a great saving of expense in the length of the pleadings, and their incidents; by securing an economical and satisfactory trial at *Nisi Prius*, through the precise and specific nature of the issues required to be presented to the jury, and the effectual expedients resorted to, for the purpose of saving an unnecessary expenditure in obtaining evidence: it cannot be denied that the excessive stringency of the rules which restrict a plaintiff to a single count in respect of a single cause of action, and a defendant to a single plea in support of a single ground of defence, too frequently operates most injuriously, so as to secure the defeat of justice. It is continually a matter of serious difficulty, to refer a particular combination of facts to their appropriate legal category, and if the wrong one should be selected, substantial justice is sacrificed before arbitrary legal technicality. It would be easy to illustrate the truth of these remarks by reference to cases of daily occurrence. The rule in question must either be relaxed, or its injurious effects neutralised by greatly enlarged powers of amendment conferred upon the judge at *Nisi Prius*. With all these defects, however, it cannot be denied that the recent changes in the law of pleading, evidence, and practice, with reference to the interests of suitors, have justified the most sanguine anticipations of those who set in motion the machinery which effected those changes; and with refer-

ence to students and practitioners, have tended to exact a far greater amount of diligence, learning, and acuteness, than for a long series of years has been deemed requisite. To take one single instance—"the abolition of the unbounded and illogical effect of the **GENERAL ISSUE**," said the late Mr. Joseph Chitty, *junior*,* in the preface to his *Precedents* (published in the year 1836), "has produced, and will continue to produce, the most powerful influence in promoting investigation, and therefore extending learning and knowledge on that important branch of the law, pleading." Well established, and thoroughly explained and illustrated, as are now the pleading rules in question, we earnestly recommend the Common Law student to spare no pains to master them; and even to commit them to memory.

Want of space, alone, prevents our explaining, at some length, the difficult and often intricate nature of pleadings in even the most ordinary and apparently simple cases. We can here do no more than entreat the student to give his diligent, his earliest, and certainly his best attention, to the concise, accurate, and elegant exposition of them contained in the second part of Mr. Serjeant Stephen's *Treatise on Pleading*. A very little practical experience will satisfy the learner, that pleading *ransacks every portion of the law*. To decide upon the line to be taken on behalf of either the plaintiff or the defendant, as the case may be,—often requires equal exactness and comprehensiveness of legal knowledge, on behalf of the pleader. Simple, however, as is this machinery, and comprehensive

* The lately-deceased son of the late Mr. Joseph Chitty (whose name has been so frequently mentioned), and himself an eminent pleader.

in its application, the student must not imagine it to be of easy acquisition, or use.

A good pleader must needs be an able lawyer; for nearly the whole body of the law is, in one way or another, connected with—involved in—the doctrines and practice of pleading. It requires very extensive and accurate knowledge, to decide, for instance, on the very first question which occurs in every pleading (and to which allusion was made in the preceding chapter), viz., who will be the proper PARTIES to the action? Who ought to be,—who *may*, who *must*, be the plaintiff,—and who the defendant, as well in actions on contracts, as for torts;* and not only with reference to the *interest* and *liability* of the ORIGINAL parties; and the *number* of them; and whether standing in the situation of agents, joint-tenants, tenants in common, or partners, and who are to join, or be joined; but also in cases where there has been an *assignment of interest*, or *change* of credit, or *survivorship* between several, or *death* of *all*, or *any* of the contracting parties, or bankruptcy, insolvency, or marriage. “There are no rules,” justly observes Mr. Chitty (Sen.), “connected with the science of pleading, so important as those which relate to the persons who are to be the parties to the action: for if there be any mistake in this respect, the plaintiff is, generally, compelled to abandon his suit, and to proceed *de novo*, after having incurred great expense.” To illustrate this matter, let us recur to the case of landlord and tenant mentioned in a preceding part of this chapter—and imagine that the *landlord*, either before or *after* the breach of covenant complained of, had died, either with, or without a will; but leaving a widow, or child,

* *Vide ante*, pp. 474, et seq.

or children; or that just before his death—and either before or after the breach of covenant,—he had *sold* the house to a man who had become bankrupt; or had mortgaged it, twice over, and both or either of the mortgagees had either become bankrupt, or insolvent, or had died: or again, that the lessor had devised or bequeathed the house to two persons in trust for one of his nephews, and in case of his death, to the brother of that nephew; and after the death of his elder nephew, one of these trustees also dies, and the other becomes insolvent, the junior nephew having also either become insolvent or bankrupt, or died, with or without a will; who ought, in any of these cases, to be made the *plaintiff*? The landlord—his widow—his executor—his first or second mortgagee, or either of *their* respective assignees—*his* assignees—the trustees—the representatives of the dead trustee, or assignee of the bankrupt one—or the second nephew,—his representative or assignee? If out of all these persons the wrong one should be selected, the action will be defeated, possibly after a ruinous expenditure. Suppose, again, the case of the *tenant's* death,—either with or without a will,—or his bankruptcy, or insolvency, either *before*, or *after* the expiration of the lease, or breach of covenant,—or that he had assigned his interest in the lease to a person who is dead or bankrupt, and whose assignees have made over the lease to a stranger, a *woman*, who the next day marries—that her husband pays rent, and then assigns the lease to a man who becomes bankrupt, and obtains his certificate, &c. &c. &c.—who out of all these persons ought to be made the *defendant*?—It will be obvious to the student that to determine such questions, *and to act, promptly, upon such determination—*

as he must—requires both accurate and extensive knowledge. Nor is that all: to state, upon the record, in any such cases as those supposed, the derivation, title, and character of the parties, requires, also, the greatest attention, and familiarity with the forms of pleading.

Then, again, what shall be the FORM of action adopted?—another matter of capital importance, into which it is unnecessary here, however, to enter, since we have sufficiently explained its general nature, in a preceding chapter.*—Having selected the proper *parties*, and the proper *form* of action, and conducted the *pleadings* successfully to issue, then another important duty devolves upon the pleader or pleading barrister—viz., to advise his client as to the EVIDENCE necessary to be adduced at the trial. The *brief* must be prepared; and the attorney's first step, in all except the very plainest cases, is, to send to his pleader or barrister a draft of the intended brief, comprising a full statement of facts, an abstract of the pleadings, and an epitome of the proposed proofs, in the form of a "case, to advise on the evidence." Here is a responsible duty cast upon pleader or counsel! He must first make himself thoroughly master of the whole facts, and then consider how they are affected by the pleadings. Some facts are conclusively *admitted*; and with them, therefore, he has nothing to do, but to be QUITE SURE that they are so admitted. A mistake on this score would have a two-fold effect—to show that the pleader was equally ignorant of *pleading*, and of *evidence*. What must a client think of an adviser who has put him to great expense and vexation in bringing witnesses to prove a fact which the defendant was by his pleading clearly estopped from denying? Or who

* *Ante*, chap. x., pp. 469, *et seq.*

has represented that to be admitted on the record which clearly is *not*—and so led his client to disregard the production of the evidence by which alone his case can be established? Would that the young chamber practitioner could be present at the consultation between counsel, in a case where the evidence ready to be adduced is insufficient—and there is no time to repair the error! Either his client must, if concerned for the plaintiff, incur the expense, and have the mortification, of *withdrawing his record*; or, if for the defendant, submit to an adverse verdict which might have been averted, had he been properly advised;—And the same observations apply to the case where the pleader has *framed his pleadings* improperly.

The student must also ever bear in mind that the urgency of legal business seldom allows of procrastination. The young practitioner must decide *promptly* on the multifarious matters which he may be fortunate enough to have submitted to him. Complicated as may be the facts, difficult as may prove the selection of the requisite form of action, critical the duty of preparing the pleadings, and advising upon the evidence requisite at the trial, the pleader must make his decision, generally speaking, *at once*, if he wish to get through only a moderate share of business: and how can all this be done, with either comfort, credit, or safety, unless to a clear and thorough knowledge of legal principles be added an accurate knowledge of forms, ready and dexterous reference to decisions, and a correct application of them?

The pleader is also expected to afford prompt assistance to his clients in the sudden exigencies arising in *PRACTICE*; for which purpose a familiar knowledge of the

"practice of the courts" is indispensable. "This *practice of the courts*," says Mr. Tidd,* "is founded upon ancient and immemorial usages, which may be termed the Common Law of practice, regulated from time to time, by Rules and Orders, judicial decisions, and Acts of Parliament. The practice, is the law of the court, and as such is a part of the law of the land."† If a client cannot obtain and confidently rely upon such assistance, the chances are that he will desert his pleader; nay, he *must* do so, either partially or altogether; for he cannot trouble one man with such questions, and give his pleading business to another.—Thus, therefore, it is that our young practitioner is exercised, betimes, in pleading, practice, and evidence; three paths, as it were, which traverse nearly the whole territory of the Common Law. A little persevering attention will suffice to show him the mutual bearings of these three upon one another, and that the knowledge of one is, to a considerable extent, a knowledge of them all.

The practice of special pleading, though both laborious and responsible, is by no means in itself a *lucrative* one. "A young pleader should think himself fortunate," said, the other day, one of the judges, "if he be able to pay for his library out of his *business* during his first three years. At least I thought myself so." A pleader's fees range between 7*s.* 6*d.*, 10*s.* 6*d.*, 15*s.*, and a guinea, and in very important cases, extend to several guineas; and to earn even the smallest of these sums, frequently requires much time and labour: for the difficulty of the *law* bears no

* Tidd's Practice, Introd. p. lxxi. (9th ed.).

† Jenkin's Cent. 295; Lane's Case, 2 Coke, 17; Slade's Case, 4 Coke, 93 (b); Fogoe v. Gale, 1 Wils. 162; Rex. v. Wilkes, 4 Burr. 2572.

relation whatever to the importance or magnitude of the subject-matter of litigation. The principle determining a liability to the payment of a few shillings, is the same as that which governs rights and liabilities in respect of thousands, and even millions sterling. There is, however, a good deal of the routine business in a pleader's chambers, which requires only moderate knowledge and exertion. Pupils' fees do certainly contribute to swell the "modest gains" of the pleader. It is by no means unusual, indeed, for pleaders to have ten, or even twelve pupils a year, each paying a hundred guineas.—It should be borne in mind that the practice of pleading ought, in general, to be viewed as only means to an end. The individual who has patience, resolution, and ability enough to apply steadily to special pleading, even though he should not earn a large income, is engaged all the while in thoroughly and practically *studying his profession*, in all its secret turnings and windings,—facilitating his discharge of the court business which may hereafter come to him, and slowly but surely organising a connection which will support him, if he be deserving of support, when he shall have been called to the bar.

It can hardly be necessary, after all that has been said upon the subject of special pleading, both in this chapter, and in preceding parts of the work, to warn the youth who rashly rushes to the bar without a competent knowledge of pleading, of the folly of which he is guilty, and the danger to which he is exposing himself. To a young counsel ignorant of pleading, a brief will be little else than a sort of Chinese puzzle. He must either give up in despair all attempts at mastering its contents, or hurry in ridiculous agitation from friend to friend, making vain

efforts to "cram" himself for some occasion of solitary display, afforded him by the zealous indiscretion of a friendly solicitor. Feverish with anxiety, wretched under the apprehension of public failure, and the consciousness of incompetence, after trembling in court lest he should be called upon to show himself, he returns to chambers, to curse his folly—to make, when too late, exertions to retrieve his false position, or abandon it for ever, with all the cloud-picturings of a vain and puerile ambition.

It remains to be added, that so sensible has the legislative become, of late years, of the importance of encouraging gentlemen to practise as special pleaders, that it has allowed the years so spent, to be reckoned in making up the length of standing requisite to qualify members of the bar, to hold a great number of important judicial, and other situations.

CHAPTER XVI.

 OUTLINE OF A COURSE OF LAW READING, PRINCIPALLY
 DESIGNED FOR THE COMMON LAW STUDENT.

 Non quàm multa, sed quàm multum.—SENeca.

“OUR student,” says Sir Edward Coke,* “must (all excuses set apart) bind himselfe unto a timely and orderly reading: for there be two things to be avoyded by him as enemies to learning—PRÆPOSTERA LECTIO, ET PRÆPROPERA PRAXIS.” The author ventures to hope, on the strength of some little experience, that the course of study recommended in the XIIIth, and in the present chapter, will be found to steer clear of both these evils; and that the student will derive advantage from a steady adherence to it.—When the author entered the profession, anxiously desirous to make the best of his time, his inquiries among competent advisers, secured him the advantage of *three widely differing* courses of study, each of which he was confidently assured, by its proposer, was the “only safe way,” the “only sound scheme of study,”—and so forth! Without, however, recurring to topics sufficiently discussed in a preceding chapter, we shall proceed to recommend that course of reading, and those sources of information which, upon mature consideration, some

* Coke Litt. 70, b.

experience, and extensive inquiry, appear to us to be best adapted for the student preparing for the Common Law bar: premising that he is supposed to have adopted our advice in betaking himself, in the first instance, to the chambers of a pleader in moderate practice, and who will devote some little time each day to reading with him. "Those proceed right well in all knowledge," says the illustrious Lord Bacon,* "who couple study with their practice, and do not first study altogether, and then practice altogether."

We must strenuously insist on the student's first addressing himself to PLEADING. Until he shall have become familiar with its language, and with the drift and scope of its leading doctrines and principles,—in doing which, will also, moreover, be obtained some acquaintance with the law of Practice and Evidence,—his progress, he may depend upon it, will be very slow and unsatisfactory. The want of clear and distinct notions on these subjects, will operate as a continual stumbling-block to him at the very outset of his career. Not a case in the Reports will be thoroughly intelligible, unless the student approach it armed with this preliminary information: he will only partially understand it; or altogether misunderstand it; or if, with great effort, he should have succeeded in really mastering its technical details, he will soon forget them, and have suffered his attention, on each occasion, to be unduly interrupted, and called away from the main object to which it had been addressed. From a passage† in Sir Edward Coke's Commentary on Littleton, it may be inferred that he entertained similar opinions. "I would advise our student, that *when he shall be enabled and armed* to set upon

* Works, vol. vii. p. 92.

† Coke Litt. 70, a.

the Yeare Books, or Reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched either in Westminster Hall (where it is necessary for him to be a diligent hearer, and observer of cases of law), or at Readings, or other exercises of learning, he may find out and read the case so vouched; for that will both fasten it to his memory, and be to him as good as an exposition of that case.”—“THE LAW ITSELF SPEAKETH BY GOOD PLEADING,”—it is “*IPSIUS LEGIS VIVA VOX*,” says elsewhere the same great authority.* Does it not then appear consistent with good sense, to require in the student, in the very first instance, a familiar acquaintance with the *law's language*?

“The study of pleading,” says an able and acute anonymous annotator upon Roger North’s Discourse on the study of the law;† “is the FOUNDATION of the common lawyer’s knowledge. An acquaintance with it is as essential to a lawyer, as a knowledge of anatomy is to a physician. The principles, divisions, and distinctions in pleading, are founded upon, and arise out of, the general rules of law, or have, in their turn, given origin to those rules; and it is therefore impossible to be acquainted with the mode of pleading, and at the same time be ignorant of the law of the case to which that pleading is applicable. It is, consequently, of the highest importance to obtain an insight into the theory and practice of this science, which, from its extent and occasional difficulty, exacts a considerable portion of diligence and perseverance. The student of the Common Law ought, therefore, to bestow his best attention upon this science, which at the present day is

* Coke Litt. 115, b.

† Notes and Illustr. pp. 78, 79.

properly accounted an essential part of professional education ;" and, for the reasons already assigned, ought to be the *earliest* part of professional education. A clear and connected view of the course of an action, from its commencement to its close, may be attained with comparatively little effort : and *if retained*, and made the nucleus of continually increasing acquisition, will easily open the view of the student into the whole system of the Common Law, with all its relations and dependencies. The masterly treatise on pleading of Mr. Serjeant Stephen—a work distinguished equally by its accuracy, perspicuity, and comprehensiveness,—should be the first book put into the hands of the pupil on entering chambers. It is divided into two parts : the former being “a summary and connected account of the whole proceedings in an action, from its commencement to its termination,” and extending to no more than 120 pages. A fortnight or a month’s attentive study of this first Part, with the instructions of a pleader, will enable the student thoroughly to master its clear and brief details, and comprehend the general drift of the business going on in chambers. In fact, this first part ought to be almost entirely committed to memory : especially the definitions of the different Forms of Action. Thus will the student obtain his first introduction to the two branches of PLEADING and PRACTICE : for the first part of Stephen may be regarded as an elegant epitome of the elements of practice : of which Mr. Smith’s Elementary View of the Proceedings of an action at law (the third edition was published in 1842), may be regarded as an expansion. This little work (200 pages 12mo) is the best of the kind, extant ; and adapted to the present improved practice of the law. Having

become thoroughly familiar with this little work, the student will be prepared for the more elaborate works on PRACTICE—of which the leading one is Archbold's Practice, very ably edited by Mr. Thomas Chitty, himself a very eminent pleader. This work is in two thick 12mo volumes, and has within the last few years passed through no fewer than seven editions; and a new one is now [1845] passing through the press. TIDD'S PRACTICE—for many years justly considered "the polar star of the practitioner,"* and deserving of that character, from its comprehensiveness, and scientific character, still continues to be cited in the courts, not merely as a standard text book, but almost as an *authority*, on account of its unrivalled accuracy. It cannot now, however, be relied on by students and practitioners, in consequence of the vast alterations in the law effected during the last twelve or fifteen years. On every portion of still existing law, however, contained in it, this work continues to be a high authority. A series of *supplements* has been published, with a view of keeping pace with the perpetual changes in the law: and in 1837, Mr. Tidd published his "*New Practice*," in one moderate-sized octavo volume, altogether founded on the improved state of the law, as it existed in that year. Since then, however, such material changes have been effected, as to render a new edition, by either Mr. Tidd himself, or a thoroughly experienced and competent editor, indispensable. If such a one were to be published, it would be invaluable to the student and practitioner.—We would here apprise the former that few things *tell* sooner in favour of the young pleader or barrister, or fix him firmer

* See Wentworth's Precedents, vol. x. Pref. 3.

in the confidence of his clients, than a ready and accurate knowledge of PRACTICE.

The second part of Stephen on Pleading, constitutes the bulk of the work ; affording, in the language of the author, "an entire, though general view of THE ENTIRE SYSTEM of pleading, and of the relations which connect its different parts together."

Here he discusses the rules framed in order to *produce* an issue: to secure its *materiality, singleness, and certainty*; and to avoid *obscurity, confusion, prolixity, and delay* in pleading. This portion of the treatise extends to about 350 pages, and should be studied with deliberate and profound attention. Its arrangement is perfect, and its style of composition, beautifully lucid and terse. As the First Part was calculated for an introduction to the works of writers in *Practice*, so the second forms the only proper preparation with which we are acquainted, for the extensive and elaborate Treatise on Pleading contained in the first volume of "Chitty on Pleading." Of this elaborate and systematic performance Mr. Serjeant Stephen speaks in the following terms of just eulogy :—

"It is to a writer of our own day that the honour is due, of having first thrown effectual light upon the science of pleading, by an elaborate work, in which all its different rules are collected, arranged in convenient divisions, and illustrated by explanation and example. The work here mentioned is the well-known Treatise on Pleading by Mr. Chitty ; which no person competent to appreciate the difficulty of the task performed, can ever peruse without high admiration of the learning, talent, and industry of the author."*

* Steph. on Plead. Pref.

This important work has long stood unrivalled, and alone, in professional estimation. It was accommodated by its very learned author—in the sixth edition, in the year 1836—to the new system of pleading: since which period, a *seventh* edition, in four large octavo volumes, has been published (in 1844), edited by Mr. Greening, and, as far as the author has had the opportunity of judging, with due care and ability. The last three volumes consist of Precedents. No practical lawyer can dispense with this book. The student should familiarise himself with every part of it, and even, when not engaged in drawing pleadings, be perpetually studying the precedents; paying special attention to the numerous excellent *notes* appended to them. Before quitting the subject of pleading, let us observe, that notwithstanding the great changes which have been recently effected in that branch of the law to which we have so often called attention, scarcely any of them have affected the THEORY of pleading. It is governed by precisely the same rules, now that the pleadings are transcribed on paper, as those which were in force when the pleadings were pronounced *vivâ voce*. “It is curious to remark,” justly observes Mr. Smith,* “that while the new Rules have altered the ancient practice in most other cases to which they have been applied, their effect in pleading has been to bring it back to its old bounds, and destroy innovations which had crept in on the ancient system; so that Comyn’s Digest is as useful to a pleader to-day, as it was when it was written.”—The volume of Lord Chief Baron Comyn’s Digest here referred to, is a most masterly performance, but not fitted for the pupil’s *study* till he shall have made some progress in the science of pleading. The

* Elem. View, p. 60 (2d ed.).

same observation may be made concerning another great text-book of the law, held in special reverence by Pleaders,—Saunders's Reports, edited by the late Mr. Serjeant Williams, and subsequently enriched with numerous annotations by the present Mr. Justice Patteson, and Mr. E. V. Williams, the latter of whom has just (1845) published a new edition of the work, edited with great learning, accuracy, and judgment.

As soon as the pupil has acquired some *general* knowledge of the scheme of pleading, he should address himself to EVIDENCE. No man can be a good pleader, without a sound knowledge of the law of evidence; nor can any one obtain *that* knowledge, who does not understand pleading. The two are in fact inseparably connected together, and it is absurd for him to go into court who is ignorant of either. Incomparably the best treatise on the law of evidence hitherto published in this country, is that contained in Mr. Starkie's "Practical Treatise on the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings," in three volumes 8vo. The first contains an admirable exposition of the *principles* on which the law of evidence is founded, and should be deeply studied by the pupil: the remaining two volumes are of a practical character, consisting of a very convenient arrangement of the law of evidence applicable both to civil and criminal cases. Notwithstanding, however, what we have said concerning the great value of Mr. Starkie's Treatise, we must strongly recommend to the student a work on the same subject, which is perhaps still better adapted than that of Mr. Starkie, for a *first* book in this branch of legal science. It was composed expressly for the use of students, by Mr. Greenleaf, one of the professors in Harvard University, in

America, and an able and experienced teacher his work shows him to be. It is an octavo volume, and the student should, instead of purchasing the American edition, wait for that which is forthcoming, adapted to the existing state of English law, by Mr. Pitt Taylor, of the Home circuit; a gentleman whose talent and experience will be well bestowed on the undertaking in question. If he succeed, he will undoubtedly deserve the cordial thanks of the student. Phillips on Evidence has long been a great authority on that branch of law: it was, till lately, in two volumes, the first of which contained an exposition of the law of evidence generally; the second that applicable to particular actions. The former volume has since been expanded into two, undoubtedly edited with care and ability; but the second volume of the original work has not hitherto, after an interval of several years, made its appearance. The edition of the portion which was last published, is valuable to the experienced practitioner, but not so well adapted for students, as the first volume of Mr. Starkie's Treatise, or that of Mr. Greenleaf.—Thus much for what may be called the *machinery* of the law—Pleading, Practice, and Evidence. Let us now come to that upon which it operates, and with which it is necessarily conversant—viz., the general body of the law, consisting of Civil Rights and Liabilities, in respect of Persons and Property. The two grand divisions of law, are those of **MERCANTILE LAW**, and **REAL PROPERTY LAW**: but there are a number of important heads which do not fall within either, and to which we shall presently allude.—First, however, as to Mercantile Law. In this great commercial country almost two thirds of its litigation springs out of the business transactions in which the bulk of society is perpetually engaged; and the

student will, on entering chambers, very soon see this exemplified, by the cases and pleadings respecting Bills of Exchange, Promissory Notes, Bankers' Checks, Agency, Bailments, Partnership, Bankruptcy, Shipping, Insurance, and the various *Contracts* which give rise to them. To the Law of Contracts, then, the student must early and sedulously apply himself. Pothier, a late celebrated French jurist, is justly reckoned a great authority on this subject. His *Treatise on the Law of Contracts*, was translated by the late Sir W. D. Evans, with notes illustrative of the English law, in two volumes, octavo, [A. D. 1806.] "It is remarkable," said that eminent judge, Lord Tenterden,* "for the accuracy of the principles contained in it, the perspicuity of its arrangement, and the elegance of its style." Sir William Jones thus speaks of it:—

"Here I seize with pleasure an opportunity of recommending his (Pothier's) admirable treatises on all the different species of express or implied *contracts*, to the *English* lawyer; exhorting him to read them again and again: for if his great master, Littleton, has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works in which all these advantages are combined, and the greatest portion of which is law at Westminster†, as well as at Orleans. For my own part, I am so charmed with them, that, if my undissembled fondness for the study of juris-

* Preface to his *Treatise on Shipping*.

† See, amongst very many other cases, that of *Cox v. Troy*, 5 B. & Ald. 474, in which the judges principally grounded their decision upon the writings of Pothier.

prudence, were never to produce any greater benefit to the public, than barely the introduction of Pothier to the acquaintance of my countrymen, I should think that I had, in some measure, discharged the debt which every man, according to Lord Coke,* *owes to his profession.*"

For obvious reasons, the species of Contracts almost universally used in mercantile affairs, is that of Simple Contracts†, — expressed or implied, — either verbal or written; and certainly the best practical work on that subject for the Common Law practitioner, though it is not without its faults, is the "Treatise on Contracts not Under Seal," of the late Mr. Joseph Chitty, junior, which the student should purchase almost as soon as he enters chambers. The last edition (the third), was published in 1841, in one thick volume, considerably enlarged, and adapted to the new system of pleading. A new edition is announced as in preparation, and it is to be hoped that it will be edited with the care and judgment which the subject requires.‡—The first object, then, of the student, should be to master the principles governing contracts, generally. The next will be the different *species* of mercantile contracts; which may be classed under the heads of Bailment, Agency, Bills of Exchange, and Promissory Notes, Partnership, Insurance, Carriage, and Sales. These may be regarded as comprising all the kinds of contracts by

* *Quære*—Lord Bacon † See his Law Tracts, 28.

† See the different kinds of Contracts explained *ante*, p. 476, *et seq.*

‡ "A Treatise on the Law of Contracts not Under Seal," in one vol. 8vo, has just [1844] made its appearance in America, and in this country; and its author is Mr. Story, a son of Mr. Justice Story. It has many features in common with Mr. Chitty's Treatise on Contracts; and as far as a slight examination has enabled us to judge, appears to be well executed, and to contain valuable illustrations of the occasional conflict between English and foreign law, on the subject of contracts.

means of which trade and commerce are carried on ; and the first five of them are the subjects of as many distinct elementary treatises, by that indefatigable, learned, and experienced jurist Mr. Justice Story. We have been for some time familiar with them ; and can confidently recommend them to the student as better adapted for his purposes, and indeed for those of practitioners, than any others which we are aware of being extant. Though, possibly, this writer's practical application of legal rules, to facts, may not always be sufficiently accurate, still we have no hesitation in expressing an opinion that his Treatises are the productions of a man of enlarged and comprehensive knowledge of the principles of jurisprudence, and are enriched by copious illustrations from the civil law, and the writings of foreign jurists of established eminence. The following observation in the preface to the Treatise on Bailments, is, to a certain extent, well founded in fact, and also indicates the object which the writer had proposed to himself :—

“There is a remarkable difference in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write Practical Treatises which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full indexes to the reports, arranged under appropriate heads ; and the materials are often tied

together by very slender threads of connexion. They are better adapted for those to whom the science is familiar, than to instruct others in its elements. It appears to me that the union of the two plans would be a great improvement in our law treatises, and would afford no inconsiderable assistance to students, in mastering the higher branches of their profession. * * This work is principally designed for students."

The first treatise (each of which is contained in a single 8vo volume) is that on BAILMENTS; (from *βαλλειν*, to *deliver*,) a word which affords the student no clue to the real nature of the extensive subject indicated by it. Mr. Justice Story, acknowledging the difficulty of doing so, defines it (§ 2.) to be a "delivery of a thing in trust for some special object or purpose, and upon a contract express or implied, to conform to the object or purpose of the trust;" correctly stating it to lie at the foundation of many commercial contracts, and to be of perpetual, though tacit reference in the law of Shipping and Factorage. It embraces all sorts of Deposits, Loans, Pledges, or Pawns, Hiring, Letting to Hire, and Mandates, (which last signifies an undertaking by a party, without recompense, to do some act for another in respect to the thing bailed): whence may be gathered the extent, difficulty, and importance of the subject. The next is AGENCY, a word which at once suggests the extensive nature of the matter treated upon. BILLS OF EXCHANGE and PROMISSORY NOTES are prudently made the subject of distinct treatises (but the latter will not be published in this country till after this work has quitted the press). PARTNERSHIPS form the subject of the last treatise, which contains a truly luminous exposition of a

subject noted for its intricacy, and the subtlety of the rules upon which the system depends.

It is to be hoped that the law of INSURANCE will be the next subject treated of by Mr. Justice Story; and that he may live to complete that "Series of Commentaries on the different branches of Commercial and Maritime Jurisprudence," of which he tells us, in the preface to his Law of Agency, that that treatise was the commencement. These branches of Commercial Law—Agency, Bailments, Partnerships, Bills of Exchange, Promissory Notes, and Insurance, are of equal importance and difficulty, and require corresponding exertion on the part of the student. Much practical information on all of them is to be found, of course, in Chitty on Contracts, and also in Selwyn's *Nisi Prius*. The principal English works on Bills of Exchange, are the "Summary" of the late Mr. Baron Bayley, a work of great authority; the large treatise of the late Mr. Chitty, and the smaller one of Mr. Serjeant Byles. The last is very well adapted for students and young practitioners, being, though very concise, correct and comprehensive. The best English treatise on the law of Partnership is unquestionably that of Mr. *Collyer*, as containing a full statement of the principal decisions of Lord Eldon, whose subtle and powerful legal intellect pre-eminently distinguished itself in cases of Partnership and Bankruptcy. The last edition of this valuable work was published in 1840.

The head "Partners" in Selwyn's *Nisi Prius* is very slight, but still as satisfactorily treated, as such a subject—containing so much of Equity—can be, in a *Nisi Prius* book. The law of Joint Stock, Banking, Railway and other Companies, is a branch of the law of Partnership, which

has recently undergone important and beneficial legislative alterations,* which are the subject of several works recently published, or announced as in preparation.

The law of BANKRUPTCY AND INSOLVENCY is, as we have had frequent occasion to observe, and to lament, in an unsettled and most unsatisfactory state. We feel great difficulty in pointing out any works on this branch of the law, so incessant have been recent alterations in it, and so important those which it seems still fated to undergo. The best epitomes of the law of Bankruptcy, are to be found in the last edition of Selwyn's *Nisi Prius*, and of Smith's *Mercantile Law*. The latter contains the excellent description of the general scheme and policy of the Bankruptcy law which will be found in the subjoined note†. Arduous as is the study, and uninviting as is the

* *Vide ante*, pp. 34, 35.

† "The legislature, considering that men engaged in mercantile pursuits must, of necessity, be more often, and largely, indebted than other persons—considering also that it would be unfair to creditors, and injurious to the interests of commerce, to allow a failing trader to select some favoured claimant, and liquidate his demand at the expense of the rest, has enacted a series of regulations called 'the Bankrupt Laws,' which insure to the creditors of an insolvent trader, an impartial distribution of their debtor's property, if they will take the right steps to obtain it: while, in order to prevent a trader, really in a state of hopeless insolvency, from continuing to speculate and deceive others, until he shall have consumed the last remnant of his effects, and left nothing to be shared among his creditors,—it has directed that certain acts, if done by him, shall be looked on as *conclusive evidence* that he is in such a condition, as entitles his creditors to proceed against him, under the bankrupt laws. These acts, the nature of which will be presently explained, are therefore called *acts of bankruptcy*; the trader who has committed one of them is, from that time forth, a *bankrupt*; and, if proceedings be not thereupon taken against him, it is only in consequence of the ignorance, indisposition, or good nature of his creditors. But, as it would be inhuman to reduce a trader, whose failure is imputable less to his fault than to his misfortune, to perfect destitution, by stripping him of all the remnant of his property, he is—except in cases of misconduct—allowed

first aspect of bankruptcy law, the student must not shrink from it: he must give up all pretence to the character of a commercial lawyer, unless he make himself early acquainted with this extensive, intricate, and all-important subject. The best English treatise on Mercantile Law generally, is that of Mr. Smith, entitled "A Compendium of Mercantile Law," of which a third edition was published in 1843, in one thick 8vo. volume. The "Introduction" contains a brief, but interesting sketch of the progress of Commercial Law; and the entire work is conveniently divided into four heads, treating respectively of *Mercantile Persons*, *Mercantile Property*, *Mercantile Contracts*, and *Mercantile Remedies*. This work is characterised by its accuracy, compression, and excellence of arrangement; but is perhaps of too condensed and practical a character to be interesting as

a sum of money, out of the produce of his own effects, for his future support, and to put him in the way of honest industry; and this sum is proportioned to the value of his property, as compared to his debts—so that additional inducement is thus held out to fair dealing, and an *early disclosure* of his embarrassment. Besides this, he has an indemnity granted him, of being free and discharged for ever, from all debts owing by him at the time when he became a bankrupt—so that he is a clear man once again; and, by the assistance of his allowance, and his own industry, may become a useful member of the commonwealth. Thus we see, that as, upon the one hand, the bankrupt law is a law of severity, inasmuch as it compels a total cession of the bankrupt's property, whether he will or not, and subjects him to very heavy punishment in case of misconduct; so, upon the other hand, it is a law of mercy, rescuing him from the pressure of embarrassment, which might otherwise have damped his spirits, and crippled his future exertions, and providing him with the means of re-commencing his trade, and again claiming the support of former connexions; who, if during the legal scrutiny to which it is subjected, his conduct prove to have been blameless, are, as we find from experience, often very forward to assist him. From all this it appears that the policy of the Bankrupt-law comprehends two grand objects:—*first*, the distribution of the debtor's effects in the most expeditious, equal, and economical mode; *secondly*, the liberation of his person from the demands of his creditors, after he has made a full surrender of his property."—*Compend. Mercant. Law*, pp. 519—521 (3d ed.)

a first book to the student. SELWYN'S *NISI PRIUS* has long enjoyed a high reputation as at once an elementary and practical work, on all those heads of law which are directly or incidentally involved in the practice of *Nisi Prius*: of these it contains a condensed methodical summary, and the new edition (the eleventh) just [1845] published, comprises all the alterations recently effected in the various branches of which it treats, carefully incorporated into the text, by the learned author himself. "*ABBOT ON SHIPPING*" is a very valuable work, and was written by the late Lord Tenterden. Its style is distinguished by accuracy, clearness, and elegance, and it is cited as an acknowledged authority in our courts, wherever the law of which it treats has not been altered. There has recently been a new edition of the work, carefully edited by Mr. Serjeant Shee. This head of law has recently (1844) undergone material alterations, by stat. 7 & 8 Vict. c. 112, entitled "*An Act to amend and consolidate the laws relating to Merchant Seamen, and for keeping a Register of Seamen.*" This is a very important statute, and requires the attention of the student. *INSURANCE* is another great kind of Mercantile Law; and of which the student will find an excellent compendium in Selwyn's *Nisi Prius*, and Smith's *Mercantile Law*. The principal work on the subject, is that of the late Mr. Justice Park, of which the last (8th) edition was published in 1842. It was under the auspices of Lord Mansfield* that this branch of the law was organised into a system. "The law of Insurance has been frequently mentioned," said the late Mr. Roscoe,† "as an instance of the admirable manner in which his powerful mind created a system of law adapted to all the exigencies of society."

* *Vide ante*, p. 33.

† *Lives of Lawyers*, pp. 216-7.

When he was raised to the bench, the Contract of Insurance was little known, and a few unimportant *Nisi Prius* decisions was all that were to be found on the subject: yet this branch of the law, so little understood, grew up, under his administration, into a system remarkable for the excellence of its principles, and the good sense and simplicity of its practice." The law respecting SALES OF GOODS AND MERCHANDISE, and SERVICES AND WORKS, in all their varieties, and of CARRIAGE (or AFFREIGHTMENT), will be found in Chitty on Contracts, in Smith's Mercantile Law, and Selwyn's *Nisi Prius*.—We have now disposed of all the great heads of our mercantile law, which foreign jurists of eminence acknowledge to have been brought to a very high degree of excellence, and to exhibit a comprehensive and enlightened spirit of jurisprudence. It is based upon very different reasons and principles from those which govern real property law: and is derived from a variety of sources and authorities—from international law, the different maritime codes of ancient Europe, but far above and beyond all, from the Imperial Code of Rome. Personal property is the chief object of commerce, and with that kind of property consequently is the mercantile law chiefly conversant. In early times, however, as we have seen,* personal property was utterly disregarded, from its insignificance; our ancient jurists being entirely absorbed in applying the principles of the feudal system, in all its consequences, to real property. Whenever they vouchsafed to notice the other despised sort of property, they adopted, almost implicitly, the doctrines and language of the civilians. As questions concerning personal property grew more frequent, through

* *Vide ante*, p. 447.

its increasing importance, and the growth of commerce, the judges soon found themselves completely at a loss to solve those questions by the principles of the feudal law; and easily fell into the habit of referring to the already mature system of Justinian, which had already been adopted by the ecclesiastical authorities, to whom had been intrusted the administration of personal property on the death of its owner.* Thus it came to pass, that the Imperial law, at that very time so indignantly expelled from any interference with the landed interest of the kingdom, was adopted as the governing principle of a description of property destined ultimately to compete in importance with the landed interest itself.† It is for these, among other reasons, that we have, during the course of this work, so strenuously insisted on the student's acquaintance with the civil law; and upon this ground rests one of the strongest claims on his attention of those treatises of Professor Story which we have so strongly recommended.

With reference to REAL PROPERTY LAW, we have spoken so fully in the chapter on Conveyancing, that we refer the reader to it, and to the works there recommended; particularly Mr. Williams's Principles of the Law of Real Property: ‡ a work with which no Common Law student should neglect to provide himself at the outset of his pupilage. The second volume of Blackstone's Commentaries contains an outline, at once elegant and accurate, of the system of our Real Property Law, as it existed previously to the late alterations, and will continue long to exist, with reference to those transactions of days gone by, which must necessarily come, for many years, under the

* Smith's Merc. Law, p. 4.

† Smith's Merc. Law, pp. 4, 5.

‡ *Ante*, pp. 560, et seq.

notice of the lawyer.—Mr. Hayes's "Elementary View of the Common Law Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates,"—(p. 82) is a clear and scientific sketch of the very difficult subject of which it treats. SHEPHERD'S TOUCHSTONE is a work of great authority—containing the cream of Coke upon Littleton; and with, certainly, much that is obsolete, a great deal of important law now in force. Mr. Preston's edition of this work, Mr. Butler characterised as "invaluable."*—It is principally in questions between landlords and tenants, and their representatives, and in actions of ejectment and replevin, that the young common lawyer is most frequently brought into contact with real property law. Such portions of it as are applicable to the more ordinary of these occasions, will be found scattered over Chitty on Contracts, Selwyn's Nisi Prius, and Woodfall's Landlord and Tenant: a bulky volume, of which a new edition was published in 1844, edited by Mr. Woollaston. This is a valuable work, containing every kind of practical information relative to the subject of which it treats, very well arranged. The works of Fearn, Sanders, Sugden, Preston, Cruise, Jarman, Coote, Powell, Burton, and other leading writers on real property law, will be found enumerated in a preceding page. COKE UPON LITTLETON, in its present form, is absolutely a *sine quâ non* to the common lawyer: but an edition of it by a scientific editor, indicating accurately the changes which have been effected since Mr. Butler's notes were written, is a boon which the whole profession would hail with thankfulness.

The works best calculated to afford the student elemen-

* *Ante*, p. 577.

tary information on **EQUITY**, and **CRIMINAL LAW**, will be found enumerated in the chapters respectively appropriated to those subjects. We also venture to recommend a perusal of those chapters themselves; in which we have endeavoured to give a full and faithful description of these important departments.

There are certain general heads of law to which we must point the student's attention, as those coming very frequently into play, and consequently requiring his early and diligent study:—

I. The law of LIBEL AND SLANDER. This will be found well stated under the respective titles in Selwyn's *Nisi Prius*, and also in Starkie's and Roscoe's *Evidence*. The student will bear in mind the late important statute for "Amending the Law respecting Defamatory Words and Libel" (6 & 7 Vict. c. 96). The only separate treatise on this subject, of any note, is that of Mr. Starkie, in two vols. 8vo, but published so long ago as 1830. Much judgment is requisite in framing the pleadings in these actions, and discretion in advising upon them. **II. The different actions of TRESPASS**—for assaults, false imprisonments, and for forcible injuries to real and personal property, constitute another leading branch of common law practice, often of great difficulty, and requiring extensive and exact legal knowledge. **III.** The same observations apply, to some extent, to actions brought for irregular or illegal **DISTRESSES**; which are of very frequent occurrence. If a landlord or his broker make never so small a slip in conducting a distress, they are sure to have an action brought against them, in which the proceedings are generally of a very harassing nature, occasioning much expense and vexation. As these actions often

arise out of cases of tenancies on a small scale, they are generally entrusted to the class of younger pleaders and barristers; on whom, therefore, it is incumbent to acquaint themselves, betimes, with the law applicable to the subject. Selwyn's *Nisi Prius* contains chapters on both the above classes of actions. See also the appropriate heads in Starkie's or Roscoe's *Evidence*. The law of Distress will also be found at length in Woodfall's *Landlord and Tenant*.—IV. The law regulating the rights and liabilities of HUSBAND AND WIFE, and EXECUTORS AND ADMINISTRATORS, is obviously brought into incessant operation, and continually gives rise to very nice and difficult questions. Outlines of both these subjects are given in Selwyn's *Nisi Prius*, under the title "Baron and Feme,"—and "Executors and Administrators." The latter forms also the subject of one of the most accurate and comprehensive Treatises which have been written on any legal subject for several years—in two large 8vo volumes, by Mr. E. V. Williams, the editor of Saunders's Reports. This treatise has quite superseded all other works on the same subject.—V. EJECTMENT is also an action of perpetual occurrence; and its practical proceedings are of such an intricate and perplexing nature, as nothing but early and deliberate attention on the part of the student, or young practitioner, will enable him to master. This head, also, will be found in Selwyn's *Nisi Prius*, and the practical details in Chitty's *Archbold*, in which they are very conveniently arranged.—VI. MUNICIPAL CORPORATION LAW should receive the close attention of the student, especially if he intend going early to the bar. Questions are continually arising out of the working of the statute, by which our entire municipal

system was recently remodelled, viz., that of 5 & 6 Will. IV., c. 76, which has been since amended by several other Acts. These should be carefully and repeatedly read, so that their leading provisions may become familiar to the young practitioner; who should also attend to the discussions on them taking place in the Queen's Bench, in order that he may become generally acquainted with the principles applicable to such cases.—VII. ELECTION LAW is entitled to its share of attention on the part of the Common Law student; for it is members of the Common Law bar, who are usually retained to conduct this branch of business. The system of Election Law has been very recently entirely remodelled by the legislature—viz., in respect of its fundamental principles, in the year 1832, by stat. 2 Will. IV., c. 45 (the "Reform Bill"), and in respect of its details, as far as concerns the trial of election petitions, in 1844, by stat. 7 & 8 Vict., c. 103. Mr. Rogers' work on Election Law treats of both branches of the subject—viz., Elections and Election Committees: but perhaps that of Mr. ELLIOTT is better fitted to give the student a clear and concise account of the subject.—VIII. COLONIAL LAW is also a subject of importance to students, whose connection or opportunities may afford them early an introduction to practise before the Privy Council, and the House of Lords. To this subject we have already briefly alluded.* By these two tribunals are reviewed the decisions of all the colonies and foreign possessions of our vast empire, with their varying systems of judicature. A general outline of them, at all events, the young practitioner should early acquire, so as not to be entirely at a

* *Ante*, p. 511.

loss, when his services are first required. Mr. BURGE'S COMMENTARIES on Colonial and Foreign Law generally, in four large 8vo volumes (published in 1838), is a very elaborate and comprehensive work, indispensable to the practitioner in this department. Mr. Justice Story's CONFLICT OF LAWS,* of which a second and greatly enlarged edition, in one thick volume 8vo., was published in 1841, is one of the most interesting, and valuable juridical publications of modern times; and ought to be in the possession of every lawyer—in whatever department he may practise—who aims at obtaining an enlarged and comprehensive view of LAW, as applicable to some of the most important rights and relations of mankind. Of this work it is difficult to speak in terms of adequate eulogy. Its value to those, especially, who are concerned in conducting those Appeals of which we are speaking, is obvious. Mr. MACQUEEN'S Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council (1842), is indispensable to this class of practitioners. It is a work of very superior merit; and has had the advantage, it appears, of revision by one or two of the most eminent of the judicial peers. While it is of a practical character, its details being at once minute, accurate, and complete, it contains much matter interesting to the constitutional lawyer; and the style is excellent.—IX. SCOTCH and IRISH LAW forms a subject of frequent discussion in the Courts of which we have been speaking, and should consequently receive due attention from those who are likely to be

* "Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments." Second edition, revised, corrected, and enlarged, and reprinted in London, under the sanction and direction of the author, by Maxwell & Son, 1844.

engaged in appeals from the Courts of Scotland and of Ireland. This subject, however, will be discussed in ensuing chapters. Before concluding this portion of our labours, let us mention two or three works which may be safely recommended to the student, and general practitioner, as affording him essential assistance in the study and practice of the Common Law.

I. SELWYN'S *NISI PRIUS*. Of this work we have already spoken. It is a work of sterling merit, and high reputation, and, as we have already stated, has been carefully accommodated, by its author, by successive editions, to all the changes which have taken place since the first edition was published. No Common Law student should be without this book. There is, however, another which has just been published (1845) on the same subject, but on an essentially different plan, by Mr. Archbold, in two small and closely printed 12mo volumes, entitled "*The Law of Nisi Prius.*" The plan of this work is, to give under each head, *precedents* of the various PLEADINGS in strict accordance with the new system; the EVIDENCE necessary to support the various issues taken; and a concise and correct statement of the general law on all the topics treated of in the work. The first volume contains all the Forms of Action, except Ejectment; the second contains Ejectment; and also those great heads of Mercantile Law, Bills of Exchange; including Promissory Notes, Bankers' Notes, and Checks, and the three branches of INSURANCE (*i. e.* Fire, Marine, and Life Insurance). All these topics are treated by the experienced author with the brevity and precision which characterise his writings, and have secured for them so high a position in the estimation of practical lawyers. As far as the student is concerned, this work brings under

his eye at one view, the pleadings and evidence on all the leading heads of Nisi Prius Law : yet the value of the work would be greatly enhanced by a third volume, devoted to other subjects of Nisi Prius Law not treated of in the first two volumes.

II. SAUNDERS'S REPORTS constitute a mine of pleading knowledge, and a model of legal analysis. We have already, however, invited to this work the attention of the student. It undoubtedly contains much disquisition no longer applicable to the system of pleading, but calculated to throw light upon many an obscure and perplexing portion of it. We have had the new edition of it in constant use, since its appearance—and have not hitherto detected any error or omission of the least importance. We assure the student that he can never hope to become a sound pleader, unless he shall have become thoroughly familiar with this Edition of Saunders's Reports.

III. SMITH'S LEADING CASES—the idea of which was suggested, says its author, by a section in the former edition of this work (*vide post*, p. 832, Chapter XVIII., Section 6)—should be in the possession of every student. It contains seventy-five "leading" cases—*i. e.* each "involving, and usually cited to establish, some point or principle of real practical importance," taken from the Reports at large ; and each followed by a disquisition, exhibiting the manner in which the principle or doctrine established in the case selected, has been modified, or extended, and developed, by subsequent decisions. These disquisitions are equally interesting and instructive to one who has acquired sufficient elementary knowledge to appreciate them ; and the work has been several times cited with approbation by the Bench, and has already reached a second edition.

IV. BLACKSTONE'S COMMENTARIES. A long and close study of this great work, has satisfied the author, that none of the numerous changes which the law has lately undergone, have sufficed greatly to impair the intrinsic excellence and utility of the Commentaries. It is true that large portions of them have been superseded by the alterations since effected in the law: but as Mr. Chancellor Kent justly observes, while earnestly urging the study of the Commentaries, "what is obsolete, is necessary to illustrate that which remains in use." In the course of a few years, this kind of knowledge, however necessary to be acquired, will be seldom looked for elsewhere, than in the lucid pages of Blackstone. The antiquarian, the historian, the constitutional lawyer, the legal practitioner, and student, will then appreciate even more than they can now do, the value of that work which, on its appearance, at once placed the study of the law on an entirely new basis—rendering it accessible and inviting to thousands who would otherwise have avoided and abandoned it, in despair and disgust. "He it was," eloquently said Lord Avonmore, "who first gave to the law, the air of a science. He found it a skeleton, and clothed it with life, colour, and complexion: he embraced the cold statue, and by his touch, it grew into youth, health, and beauty." In respect of the style of the composition—of unrivalled purity and excellence—the perusal of it is really a luxury. Its illustrations are remarkably felicitous; and its arrangement has long been celebrated for its simplicity and completeness. Perhaps no writer has ever approached Blackstone, in the masterly ease and beauty with which obscure and perplexing subjects, are simplified and exemplified; and considering the vast extent of his undertaking, his accuracy is exemplary. It may be interesting

to the student to see collected a few of the opinions which have been expressed concerning Blackstone, by persons of eminence.

Lord Mansfield.—"Till of late, I could never, with any satisfaction to myself, point out a book proper for the perusal of a student; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss. *There* your son will find analytical reasoning, diffused in a pleasing and perspicuous style. *There* he may imbibe, imperceptibly, the first principles on which our excellent laws are founded; and *there* he may become acquainted with an uncouth crabbed author—Coke upon Littleton—who has disappointed and disheartened many a tyro, but who cannot fail to please, in a modern dress."—Holliday's *Life of Mansfield*, p. 89.

C. J. Fox.—"You, of course, read Blackstone, over and over again; and, if so, pray tell me whether you agree with me in thinking his style of English the very best of our modern writers: always easy and intelligible—far more correct than Hume—less studied and made up than Robertson."—"His purity of style I particularly admired. He was distinguished as much for simplicity and strength, as any writer in the English language."—Trotter's *Memoirs of Fox*, p. 512.

Jeremy Bentham.—"He it was who first, of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman, put a polish upon that rugged science, and cleansed her from the dust and cob-webs of the office; and if he has not enriched her with that precision which is drawn only from the sterling treasury of the sciences, he has decked her out, however, to advantage, from the toilet of classic erudition; enlivened

her with metaphors and allusions, and sent her abroad, in some measure to instruct, and in still greater measure to entertain, the most miscellaneous, and even the most fastidious societies."—Fragment on Government, Preface, p. lxxxix.

Sir William Jones.—"His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science."—Law of Bailments, p. 3.

Mr. Selwyn.—"A justly celebrated writer, who for comprehensive design, luminous arrangement and elegance of diction, is unrivalled."—Nisi Prius, vol. i. p. 45 (n.) 7th ed.

Chancellor Kent.—"He is justly placed at the head of all the modern writers who treat of the elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidden in the pages of Coke, the attraction of a liberal science, and the embellishments of polite literature."—Comm. vol. i. p. 512.

The "Commentaries" are still quoted, and as frequently as ever, in the courts of Law and Equity: if possible, with increased respect for the value of Blackstone's opinions, and of the evidence which his pages afford, of the former state of the law. The "Commentaries" have, in consequence of the late extensive changes in the law, recently received two different methods of treatment. One is, by either *incorporating, into his text*, statements of the alterations since effected in the law, or incorporating into the text of the writer, those portions of Blackstone, which are still in force. This has been done, in two separate works, by Mr. Stewart, and Mr. Serjeant Stephen; the

latter of whom, with scrupulous delicacy and fidelity, indicates this process by brackets, if it be merely half a line which is to be incorporated into his own text. Neither of these works, however, is *Blackstone's Commentaries*. The other method is to preserve the text entire, and add notes explanatory of the changes in the law. In this way have the late alterations been engrafted, in the late Mr. Chitty's edition of the "Commentaries," which has been recently edited by four gentlemen—Messrs. Welsby, Hargrave, Sweet, and Couch. Without presuming to offer any opinion on the methods adopted by his predecessors in the task of editing Blackstone, the author of the present work ventures to intimate, that he has been for years engaged upon an edition of Blackstone, (based upon that of Mr. Justice Coleridge,) which is now rapidly advancing to publication, and will be upon an entirely new plan, and on an extended scale. It will be attempted to take at once an elementary, practical, and popular view of the existing state of English law, occasionally accompanied with comparisons and illustrations drawn from that of Scotland, France, and America; pointing out the nature of all the late changes in our own system, and explaining the reasons and principles on which they have proceeded; as nearly in unison with the tone and style of the text, as is possible to the editor, after long and diligent study of that text, which, it is needless to say, will be preserved inviolate: all the notes of Mr. Justice Coleridge also being retained, as far as they are consistent with the existing law.

V. "THE GENERAL PRACTICE OF THE LAW, IN ALL ITS DEPARTMENTS," by the late Mr. CHITTY, of which a third edition was published in 3 vols. royal 8vo, in 1842, "incorporates," said its eminent and experienced author,

“ the result of forty years’ severe study and experience.” This is undoubtedly a very useful work, containing a great number of practical suggestions not to be elsewhere met with, and worthy of the learning and experience of their author. It contains a comprehensive and detailed account of the law, in all its departments; but from its bulk and miscellaneous and practical character, it is perhaps better calculated for young attorneys and solicitors, than for pleaders and barristers. To the former it will supply the place of several distinct works. The last edition of this work the author has not seen; and can therefore offer no opinion upon it.

VI. The great “ DIGESTS ” and “ ABRIDGMENTS ” of the law, are those of COMYN, BACON, and VINER. The first is the favourite of the common lawyer, the second of the conveyancer. 1. The first was the production of Sir John Comyn (Lord Chief Baron of the Exchequer), and originally published in the years 1762—7; and the last edition of it was that published in 1822, edited by Mr. Hammond, in 8 vols. 8vo. This work has long been held in the highest estimation, not only for the extraordinary accuracy of its legal positions, but for its masterly distribution of the various heads of law. It is constantly cited as an authority at Westminster, by both the Bench and the Bar. Being founded on an entirely new and comprehensive system of arrangement, and framed upon an accurate, profound, and scientific distribution of the several parts of our jurisprudence, this Digest is esteemed the most perfect model of an abridgment or system of our law. The method, however, of digesting the substance of the several cases, being very close and concise, the use of the work is more particularly advan-

tageous to the experienced barrister, in furnishing a ready reference to the cases, as recorded at large in the books of reports and other authorities. Mr. Hargrave has observed, (Co. Litt. 17 a), that "the whole of Lord C. B. Comyn's work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution: but the title 'Pleader,' seems to have been the author's favourite."* The length of time which has elapsed (twenty-three years) since the last edition, renders a new one very desirable: and it has long been announced that one was in preparation. Great learning and judgment will be requisite for such an arduous undertaking. 2. BACON'S ABRIDGMENT is also a work of much reputation, but by no means equal to that of Comyn. It is supposed by Blackstone† to have been compiled chiefly from the materials collected by Chief Baron Gilbert, and was first published from the press, principally by Matthew Bacon, Esq., whose name it bears. The last edition was published in 1882, in 8 vols. 8vo. only, edited by the late Mr. Dodd, and Sir Henry Gwillim. It contains many valuable expositions of the law. The head "*Leases*" is generally considered to be the best in the book. Mr. Justice Coleridge speaks of it as "admirable," in his note (13) to 2 Bla. Com. 320. It is obvious that Bacon's Abridgment, equally with Comyn's Digest, requires to be adapted to the altered state of the law, by an editor of adequate qualifications. 3. VINER'S ABRIDGMENT, a work of stupendous labour and research, was published by its compiler, Mr. Viner, in twenty-four volumes folio, between the years 1740—1751; and reprinted in twenty-four volumes, royal 8vo, in 1792—

* See Bridgman's Leg. Bib. 679.

† 2 Bla. Com. c. 20; Bridg. Leg. Bibliog. p. 10.

4, followed by six supplemental octavo volumes in 1799—1806; since which period there have been neither additional supplements, nor any other edition. Mr. Hargrave styles it * “an immense body of Law and Equity, and worthy, notwithstanding all its defects and inaccuracies, of forming a necessary part of every lawyer’s library.” The folio edition may now be procured for about five pounds. That sum the author expended upon the purchase of the work twelve years ago, and would certainly recommend the young practitioner to do so. He will find a great deal of important matter there, which cannot be found elsewhere, without great difficulty and inconvenience. 4. The only Digest of the Modern Law is that of Mr. Harrison: commencing with the year 1756, and concluding with the year 1844, when the last edition was published, in four large volumes, closely printed in double columns. This is a work with which the practitioner cannot easily dispense: but the last edition of it might have been much better arranged. The difficulty of reference to it unquestionably detracts greatly from the practical utility of a work calculated, by the plan on which it was originally framed, to supersede, as it did—all other similar publications.

Such are the chief sources from which the student and young practitioner may derive their knowledge of the principles and practice of the common law,—such the works appearing to the author best adapted for the purpose both of study and of reference. This chapter is to be regarded, however, as only a series of suggestions upon which the reader may or may not rely, accordingly as they may appear to him reasonable, or be sanctioned by

* Co. Litt. 9 a, in notes.

those persons of judgment and experience, whom he may have the opportunity of consulting. He is again entreated not to place too much reliance upon treatises and text books, however excellent—but to regard them as little else than guides and directories to those great store-houses and original depositories of the law, the **REPORTS**. One of the most distinguished and eminent judges of the present day, assured the author, that when a student, he devoted himself very early to the study of the Reports—commencing with the eight volumes of Durnford and East (κατ' ἐξοχὴν, the *Term Reports*)—every one of the cases in which, he read, and re-read, with the utmost attention, framing his own analysis of all the important ones, which he showed the author; and assured him that by such a process, aided by a *continual reference to principle*, he had obtained the knowledge which had been so serviceable to him during his professional career; and particularly the power of seeing at once the real drift and bearing of cases, when suddenly cited in argument.

CHAPTER XVII.

METHOD AND OBJECTS OF LAW READING, WITH REFERENCE
TO APPREHENSION—MEMORY—JUDGMENT.

WHATEVER may be the course of reading adopted by the student, however few or numerous his opportunities of so doing, let him always bear in mind that his object is, or ought to be, two-fold: not only to acquire and retain legal *knowledge*, but, in doing this, to *discipline his mind*—to engender legal habitudes of thought. An eager but short-sighted student is apt to read only for the momentary satisfaction of his curiosity—or, at most, in order to remember what he has read; but a judicious student will take care, in addition to this, constantly and vigorously to exercise those great faculties of his understanding,—apprehension, memory, and judgment.

“PERCEPTION,” says a judicious author, “is to the mind what the eye is to the body: if the sight be dim or imperfect, the ideas communicated will be also dim and imperfect.* The near-sighted man must have the object brought close to his eyes; for that reason he can see but little of it at once, and requires much time and leisure to view all the parts successively before he can pronounce

* “A clear apprehension,” says Phillips, “makes the mind receive the right and distinct notion of the thing represented, as the clearness of a glass serveth for the admission of a more exact image of the face that looks upon it; whereas, if it be soiled or dim, it rendereth either none, or an imperfect shape.”—*Stu. Leg. Ra.*, p. 10.

concerning its due symmetry and proportions. In the same manner the man of slow capacity must have the question long before him, revolve it over and over in his mind, and consider and weigh each circumstance singly, in order to form a judgment of the whole: but the sharp-sighted man—such an one was Lord Mansfield—takes in the object, with all its relations and consequences, at a glance: and so quick is his *distinguishing* faculty, that the act of conception and judgment, seems almost to be formed and executed at the same instant. * * Those endowed with this faculty, are in the fairest way of becoming eminent in any science or profession. With it, a man *may* fail, but, without it, he cannot ever be considerable *.”—“Without this,” says Phillips, “none of the particular cases can be thoroughly sifted, or sufficiently set forth. For, considering the depth of knowledge reposed in the laws of this land, and that cases of much *conformity* and *resemblance* daily happen: sharpness of apprehension is necessary, not only for the understanding of one, but also upon circumstances of matter to espy a difference in the other, and upon any sudden occasion to be able to reply to an adversary’s unexpected objections, to understand his client’s case at first opening, the drift of his adversary’s reasons at the first urging, and likewise readily to invent and fitly to apply his provided arguments. If this faculty of apprehension faileth—saith Hippocrates—all other diligences are lost, for it is the inlet of knowledge.”† These are judicious observations; but it should be borne in mind, that as there is no faculty of more importance than this, in the study of the law, so is there none which requires such vigorous control and management, lest it

* Simps. Reflect. pp. 8, 9.

† Stu. Leg. Ra., pp. 10, 11.

should, in a manner, defeat itself. *Nihil sapientiæ odiosius acumine nimio*. The youthful possessor of a quick apprehension is too apt to rely upon it unduly—if not exclusively. Accustomed to penetrate in an instant, with little or no effort, to the meaning of what he reads, he is satisfied with such momentary success, and incurs the risk of forming a hasty superficial habit of reading and thought, calculated soon to unfit him for competition with men who are greatly his inferiors in natural ability. What is the use of acquiring legal knowledge, without the power of retaining, and of using it? It is but vapour disappearing from the polished surface of the mirror, the moment after having been breathed upon it! Let the student, then, who is conscious of possessing this “sharpness of wit,” watch it with the utmost jealousy, if he wish to render it his greatest friend, instead of his greatest enemy; let him prevent its encroachments upon the province of its less showy and active sister-quality—the judgment.* Let

* “Men often stay not,” says Locke, “warily to examine the agreement or disagreement of two ideas, which they are desirous or concerned to know; but either incapable of such attention as is requisite in a long train of gradations, or impatient of delay, lightly cast their eye on, or wholly pass by, the proofs; and so, without making out the demonstration, determine of the agreement or disagreement of two ideas, as it were, by a view of them as they are at a distance, and take it to be the one or the other, as seems most likely to them upon such a loose survey.”—*Essay on the Understanding*, Book IV. c. iv. § 3.

“A student should labour by all proper methods,” says Dr. Watts, “to acquire a steady fixation of thought. The evidence of truth does not always appear immediately, nor strike the soul at first sight. It is by long attention and inspection, that we arrive at evidence: and it is for want of it, that we judge falsely of many things. We make haste to determine, upon a slight and a sudden view; we confirm our guesses which arrive from a glance; we pass a judgment while we have but a confused or obscure perception, and thus plunge ourselves into mistakes. This is like a man who, walking in a mist, or being at a great distance from any visible object (sup-

him check it when it would hurry him on from page to page—from topic to topic—each little more than glanced at! Let him resolutely pause, and take a survey of his recent and rapid acquisitions; for if he look not well after them, they will prove—to adopt the beautiful comparison of Locke—“like fairy money, which though it were gold in the hand from which he received it, will be but leaves and dust, when it comes to use.”* How often will a few moments’ such retrospection, convince the self-satisfied student, that what he had imagined himself to have thoroughly understood, he has only half-understood, or, perhaps, even altogether, *mis-understood*! Has what he read a day, or a week, or a month or two ago—passed away—

“as flits the shade across the summer field!”

If so, he has, indeed, read to no purpose—but has wholly mis-spent his time. Whatever, then, such a one reads, let him read with moderate slowness, “abiding,” as South says, “and dwelling upon it, if he would not be always a stranger to the *inside* of things.”—But *has* the student, after all, this quick apprehension for which he is here given credit? Or does he only *suppose* that he has, deluded by silly friends, and flattered by self-love? How often is a *lively fancy* confounded with an acute

possess a tree, a man, a horse, or a church), judges much amiss of the figure and situation and colours of it, and sometimes takes one for the other; whereas, if he would but withhold his judgment till he come nearer to it, or stand till clearer light came, and then would fix his eyes longer upon it, he would secure himself from those mistakes.”—*Improvement of the Mind*, chap. xv. “Of Fixing the Attention.”

* Essay, Book I., ch. iv. § 23.

perception—fancy, which is, in legal studies, but as a brilliant poppy-flower in the corn-field ! *

It would be well if every law student, whatever be his quickness, would liken himself, for a while, to the near-sighted man described in a preceding page, and make similar efforts to obtain a clear and complete view of his subject. If he wish to become really and permanently *bright*, let him imagine himself for a while to be *dull*—and take his measures accordingly. It may be safely asserted that, *cæteris paribus*, the slow is always preferable to the quick legal reader, at the commencement of his studies.—Slow work at first, makes quick work ever after. Let the pupil consider how comparatively short an interval must elapse, between the acquisition of legal knowledge and habits, and their use ; and that it rests only with himself, whether or not he shall be hereafter “ fit for the occasion sudden,” or be numbered throughout life among those who are “ *ever learning, and never able to come to the knowledge of, the truth.*”

There are few things so captivating to young lawyers of the kind now describing—of “ lively parts,” as old Phillips hath it—nothing so peculiarly calculated to mislead them, as those *general principles* which have been already alluded to †—general principles, which to be at all serviceable, must be applied with prompt exactitude to the innumerable and

* Since writing this, the author happened to discover the same thought thus beautifully expressed by Pope :—

“ Flowers of rhetoric, in sermons and serious discourses, are like the *blue and red flowers in corn*, pleasing to those who come only for amusement, but prejudicial to him who would reap only the profit.”—*Thoughts on Various Subjects*, xxix.

† *Ante*, p. 689, 690.

ever-varying combinations of circumstances presented to the attention of the lawyer. Nothing will ever enable them to appreciate and apply those principles properly and safely, but patient study, and experience. It may be laid down, perhaps, that with the young lawyer, principles should be rather the results, than the precursors, of study and practice. "*The tenant shall not dispute his landlord's title,*"—is, for instance, a well-settled rule of law; it is, apparently, a very simple one, and its policy obvious, perhaps, at a glance. The student, therefore, passes on, yielding full and instant assent. Presently a case arises which he confidently considers to be exactly governed by this maxim—apparently a mere instance of its application: and yet he will find, when perhaps too late, that it is *not* applicable—that in his hasty superficial examination, he has committed a fatal blunder, and deeply injured at once the interests of his client, and his own reputation. And so of a hundred other maxims. It requires, indeed, the nicest discrimination to ascertain whether a particular case falls within the general rule, or is governed by some of its endless limitations and exceptions; and this discrimination must be the result of calm, leisurely, and extensive study, and practical experience. General principles are edge-tools in the hands of the legal tyro; and he must take care how he handles them.

While, however, the student is warned against falling into a hasty, slovenly, superficial habit of mind, let him not fall into the opposite extreme—that of sluggishness and vacillation. Careful and thoughtful reading, does not imply a continual poring over the same page, or subject. The student might in such a case justly compare himself to the pilgrim stuck in the Slough of Despond. Because

he is required to look closely at each individual part, in order thoroughly to comprehend the whole, let him not suppose that he is to scrutinise it as with a microscope. What is required is simply, *attentive reading*. If he cannot, after reasonable efforts, master a particular passage, let him mark it as a difficulty, and pass on. He will by-and-by return, in happier mood—with increased intellectual power and knowledge—and find his difficulty vanished. The student's reading, however, must not only be thus attentive—it must be *steadily pursued*. "Without a solid, settled, and constant mind, it is impossible to make any progress in this study; for, the cases being so intricate, and the reasons thereof so deep and weighty, a wavering and unsettled mind cannot attain to the apprehension thereof—being herein like the mathematics—wherein, if the mind be caught away for but a moment, he is to begin anew. One of such an unsettled mind is not capable of meditating and ruminating upon those things which it hath with difficulty apprehended, so as to fix them, and make them its own. *Qui ex aliis, saith Seneca, in alia transiliunt, aut ne transiliunt, quidem, sed casu quodam transmittuntur, quomodo habere quicquam certum mansurumve possunt, suspensi et vagi?* And this unsettledness and inconstancy is *signum vacillantis animi et nondum tenentis tenorum suum*; in Seneca's style—it produceth divers and contrary thoughts, *aliis alio nitentibus*, which, like divers and contrary diet, hinder digestion, one thought smothering the other, not suffering him to have the least benefit of any. His body is among his books, not his mind; or, if reading, he doth not show himself attentive and diligent, but doth either number the tiles of the house, or build castles in the air—or doth nothing less than what he

should do—his thoughts being much like good women's talk at a gossiping; whereof Seneca tells us—*varius nobis fuit sermo ut in convivio, nullam rem usque ad exitum adducens, sed aliunde transiliens.*" *

One of the most frequent but unperceived sources of hindrance, to one who wishes to pursue a systematic course of legal reading, is *the undue prosecution of particular topics*. In perusing, for instance, a treatise, the student will stumble on a difficult—an obscure passage; which, as it ought, excites his attention. He begins to examine the chief case cited—that refers to others—which again lead to others—and he follows. In doing this, he accidentally lights upon a point which had occupied his attention some time before: here he finds the law so invitingly stated, that he cannot think of quitting it. *This* he follows up, as he *was* following up another topic—and so he goes on, hour after hour, perhaps, till he finds that he has drifted out of sight of the point from which he had originally started, and has quite lost the connection between his previous readings. Now, if he does not check this erratic tendency, he will never get through any book, or pursuit, satisfactorily; he will gradually incapacitate himself for fixed and continuous mental exertion. "A cursory and tumultuary reading," says Lord Coke, in the preface to the Sixth Part of his Reports, "doth ever make a confused memory, a troubled utterance, and an uncertain judgment." The acquisition of learning, however, will serve but little purpose, unless it be permanently and serviceably *retained*.†

* *Stu. Leg. Ra.*, 52, 53.

† "What booteth it to read *much*, which is a weariness to the flesh; to meditate often, which is a burthen to the mind; to learn daily with increase of knowledge; when he is to seek for what he hath learned, and perhaps, then especially, when he hath most need thereof! Without this, our studies are but lost labour!"—*Stu. Leg. Ra.* 15, 16.

This will depend much on the natural powers of the memory, but more on the manner in which it is exercised and cultivated.

"For my own part," says Dugald Stewart, "I am inclined to suppose it essential to memory, that the perception, or the idea which we would wish to remember, should remain in the mind for a certain space of time, and be contemplated by it exclusively of everything else; and that attention consists partly (perhaps entirely) in the effort of the mind to detain the idea or the perception, and to exclude the other objects which solicit its notice." *

"When we first enter on any new literary pursuit," says the same distinguished writer, in another part of his work, "we commonly find our efforts of attention, painful and unsatisfactory. We have no discrimination in our curiosity; and, by grasping at everything, fail in making those moderate acquisitions, which are suited to our limited faculties. As our knowledge extends, we learn to know what particulars are likely to be of use to us; and acquire a habit of directing our examination to those, without distracting the attention with others. It is partly owing to a similar circumstance, that most readers complain of a defect of memory, when they first enter on the study of history. They cannot separate important from trifling facts, and find themselves unable to retain anything, from their anxiety to secure the whole." †

It is a trite remark, that no power of the mind is susceptible of such rapid and sensible improvement, as the memory. It is also a common observation that the imperfection of their memory, is one of the earliest and loudest complaints of legal students. And is not the

* Elem. Philos., c. ii. p. 108.

† Phil. c. vii. § 7, p. 462 (vol. 1).

reason obvious, at least in the generality of cases? The "variety almost infinite" of objects,* to which their attention is called, they are anxious to recollect—at once; to fix them indiscriminately in their memory: and their vain efforts to do so, ensure but intense chagrin, and fruitless exhaustion both of body and mind.

"As the great purpose to which this faculty is subservient," says Dugald Stewart, "is to enable us to collect, and to retain, for the future regulation of our conduct, the results of our past experience; it is evident that the degree of perfection which it attains, in the case of different persons, must vary; first, with the facility of making the original acquisition; secondly, with the permanence of the acquisition; and, thirdly, with the quickness or readiness with which the individual is able, on particular occasions, to apply it to use. The qualities, therefore, of a good memory are, in the first place, to be susceptible; secondly, to be retentive; and, thirdly, to be ready." †

* "It is reported of Cyrus that he could have saluted all his army by the names of his soldiers respectively; and Seneca tells us that he himself, by memory, repeated 2000 names in the same order in which they were spoken to him. These facts, if true, show to what a height the memory may be carried: and if this faculty be useful to a general and a philosopher, how much more so must it be to a lawyer, when the very cases which are reported are, perhaps, more numerous than the soldiers in Cyrus' army, and are certainly more difficult to remember, there being fewer associations of ideas to assist us in recollecting the names of cases, than the names of men."—*Simpson. Reflect.*

† Phil. c. vi. § 7, p. 417. "It is but rarely that these three qualities are united in the same person. We often, indeed, meet with a memory which is at once susceptible and ready; but I doubt much if such memories be commonly very retentive: for, susceptibility and readiness are both connected with a facility of associating ideas, according to their more obvious relations; whereas retentiveness, or tenaciousness of memory, depends principally on what is seldom united with this facility—a disposition to systematise, and to philosophical arrangement."—*Ib.* 418.

The law-student, then, having distinctly comprehended what he has been reading, should reflect upon it, and so—as it were—work it into his mind, if he wishes to retain it for future use. But he must make a prudent *selection* of his topics—not bestow equal attention upon things of moment and of insignificance—upon principles and details. If he do this, his mind, he may rely upon it, will be soon choked up with rubbish. It is puerile to attempt to remember everything. The memory is, undoubtedly, a most valuable repository—but it may be, and too often is, made not a storehouse, but a lumber-room. “In vain do we flatter ourselves that we have a memory of those ideas which we cannot recollect—or which, if we do recollect, are so confused, that they perplex or embarrass, instead of explaining and illustrating a question.”* Not only must the powers of the memory be thus directed to proper objects, but the student must form the habit of reading with a constant reference to subsequent practical utility. He must read to remember. “Not only the *inclination* to recollect,” justly observes Mr. Raithby, “but the very powers themselves of recollection are impaired, and at length lost, by disuse.”

The following observations are so full of practical importance to the young lawyer, that it has been thought fit to quote them at length from the work of that distinguished writer, to whom such frequent reference has been already made—Dugald Stewart:—

“Every person must have remarked in entering on any new species of study, the difficulty of treasuring up in the memory, its elementary principles; and the growing facility which he acquires in this respect, as his knowledge

• Simps. Reflect.

becomes more extensive. By analysing the different causes which concur in producing this facility, we may, perhaps, be led to some conclusions which may admit of a practical application.

"1. In every science, the ideas about which it is peculiarly conversant, are connected together by some particular associating principle; in one science, for example, by associations founded on the relations of cause and effect; in another by associations founded on the relations of mathematical truths; in a third, on associations formed on antiquity of time and place. Hence, one cause of the gradual improvement of memory with respect to the familiar objects of our knowledge; for whatever be the prevailing associating principle among the ideas about which we are habitually occupied, it must necessarily acquire additional strength from our favourite study.

"2. In proportion as a science becomes more familiar to us, we acquire a greater command of attention with respect to the objects about which it is conversant; for the information which we already possess, gives us an interest in every new truth, and every new fact, which have any relation to it. In most cases, our habits of inattention may be traced to a want of curiosity; and, therefore, such habits are to be corrected, not by endeavouring to force the attention in particular instances, but by gradually learning to place the ideas which we wish to remember, in an interesting point of view.

"3. When we enter on any new literary pursuit, we are unable to make a proper discrimination in point of utility and importance, among the ideas which are presented to us; and by attempting to grasp at everything, we fail in making those moderate acquisitions which are

suited to the limited powers of the human mind. As our information extends, our selection becomes more judicious and more confined; and our knowledge of useful and connected truths advances rapidly, from our ceasing to distract the attention with such as are detached and insignificant.

"4. Every object of our knowledge is related to a variety of others; and may be presented to the thoughts, sometimes by one principle of association, and sometimes by another. In proportion, therefore, to the multiplication of mutual relations among our ideas (which is the natural result of growing information, and in particular, of habits of philosophical study) the greater will be the number of occasions on which they will occur to the recollection, and the firmer will be the root which each idea, in particular, will take in the memory. It follows, too, from this observation, that the facility of retaining a new fact, or a new idea, will depend on the number of relations which it bears to the former objects of our knowledge; and on the other hand, that every acquisition, so far from loading the memory, gives us a firmer hold of all that part of our previous information, with which it was in any degree connected.

"5. In the last place, the natural powers of memory are, in the case of the philosopher, greatly aided by his peculiar habits of classification and arrangement—the most important improvement of which memory is susceptible." *

Influenced by such reflections as these, let the student approach his task with a well-directed, and well-regulated energy—and if he be of even only average intellect—he

* Elem. Phil., c. vi. § 3, pp. 430, 431, vol. 1, 6th ed.

will soon find that his memory is sufficient for the duties imposed upon it. A patient, perspicacious intellect, adopting and adhering to a methodical plan of study, will very soon feel conscious of a memory gradually adapting itself to its office—forming daily innumerable secret sources of association, at once facilitating the acquisition, retention, and use of legal learning. Attention and method are, indeed, the foundation and support of memory. Frequent reflection on what has been read—perpetual recurrence to leading principles,* and application of it to the actual occurrences of business, will be the readiest way of making what is read—*our own*. It cannot, indeed, be too frequently impressed upon the student, that with METHOD he may do everything, without it he can do nothing, in legal studies. “The law is a labyrinth; and certainly, if there *be* any, *method* is that Ariadne’s clew which must lead us out of it.” † “I

* “I am inclined to believe,” says Dugald Stewart, “both from a theoretical view of the subject, and from my own observations, as far as they have reached, that if we wish to fix the particulars of our knowledge very permanently in the memory, the most effectual way of doing it is to refer them to general principles. Ideas which are connected merely by casual relations, present themselves with readiness to the mind, so long as we are forced by the habits of our situation to apply them to daily use; but when a change of circumstances leads us to vary the objects of our attention, we find our old ideas gradually to escape from the recollection; and if it should happen that they escape from it altogether, the only method of recovering them is by renewing those studies by which they were at first acquired. The case is very different with a man whose ideas, presented to him at first by accident, have been afterwards philosophically arranged, and referred to general principles. When he wishes to recollect them, some time and reflection will frequently be necessary, to enable him to do so; but the information which he has once completely acquired, continues, in general, to be an acquisition for life; or, if, accidentally, any article of it should be lost, it often may be recovered by a process of reasoning.”—*Stewart’s El. Ph.*, c. vi. § 2, vol. 1, p. 420 (6th ed.).

† *Stu. Leg. Ratio*, p. 124.

must, in general, say thus much to the legal student," says Sir Matthew Hale; "it is very necessary for him to observe a method in his reading and study. Let him assure himself, though his memory be never so good, that he will never be able to carry on a *distinct serviceable memory* of all, or the greatest part of what he reads, to the end of seven years, or a much shorter time, without the help of method: nay, what he hath read seven years since will, without the aid of method, or reiterated use, be as new to him as if he had scarcely read it." * This great man then proceeds to recommend the student's copying into a *common-place-book* "the substance of whatever he reads;" but, it may be suggested—why not rather imprint it in his memory? Why beget the habit of reliance rather on a common-place-book, than on the memory?—This subject, however, will be discussed hereafter.—One of the profoundest and most versatile scholars in England, and perhaps in Europe—in many respects one of the most eccentric—has a prodigious memory, which the author once told him was a magazine stored with wealth from every department of knowledge. "I am not surprised at it," he added, "nor would you be, or any one that knew the pains I have taken in *selecting* and *depositing* what you call my 'wealth.' I take care always to ascertain the *value* of what I look at; and if satisfied on that score, I most carefully stow it away. I pay, besides, frequent visits to my 'magazine,' and keep an inventory of at least everything important, which I frequently compare with my stores. It is, however, *the systematic disposition and arrangement* I adopt, which lightens the labours of memory. I was by no means remarkable for memory

* Pref. to Rolle's Abridgment.

when young; on the contrary, I was considered rather defective on that score."

In conclusion, a little familiarity with legal studies and practice, will convince the young reader of the truth of one of the observations already quoted from Dugald Stewart—of the practicability of acquiring a sort of technical dexterity in remembering both facts and principles. But of what avail are quick and accurate acquisition, and tenacious retention of knowledge,* without the power of turning it to practical account? In other words, what are apprehension and memory, without JUDGMENT?

"The faculty of examination, or judgment," as Sir John Doddridge saith, "is almost alone sufficient to make a ready and able lawyer. This solidity of judgment teacheth to weigh and try the particulars apprehended, and to sever for use the precious from the vile. * * Nothing is more prejudicial to it than precipitancy, and impatience of delay or attendance on the determination of right reason, which makes us commonly run away with half or a broken judgment: in which respect Aristotle in his *Ethicks* very elegantly compares it to a hasty servant who goes away posting without his errand. Without this faculty of judgment, though a man were furnished with everything else, he hath no more sufficiency to judge or

* The writer recollects a poor pious soul—one Victory Purdey by name, a collier in Somersetshire—who, incredible as it may seem, had the Bible off by heart! The writer had many opportunities of testing the reality of his acquisitions—which proved, indeed, prodigious. He had chapter and verse for everything. Mention only one word of any verse, and he would tell you exactly where it was to be found, *cum pertinentiis*, with unfaltering readiness and precision. Not a step further, however, could poor Victory go. As far as *reasoning* went, he was an idiot. He could no more have put two texts together, in proof or disproof of any particular doctrine, than he could have flown.

plead, than the Code or Digest—as one saith—which, compassing within them all the laws and rules of reason, for all that, cannot write one letter.” *

Let the student, it is once more entreated, bear in mind, in all his readings, that he is reading not for speculative but *practical* purposes; that the period will soon arrive when he must *use* his acquisitions—often in very arduous circumstances; and that he can appear in public, but as he shall have qualified himself beforehand by private study. If he do not thus reflect, and act—if considerations of this kind do not constantly *influence* his mind, he may shut up his books. Quickly as he may acquire, firmly as he may retain—it will be all lost upon him; all his faculties and acquisitions will fail him when the day of trial shall have arrived.

Whatever be the subject of the student's reading—either a Treatise, or a Report—let him imagine himself doing so in preparation for the next day's business. This reflection is calculated, more than anything else, to set an edge upon his attention—to put all his powers on the *qui vive*—to throw an air of intense and vivid interest over the driest studies. Is he reading an intricate case, full of elaborate and profound argumentation? Let him, after considering each side of the question, draw upon *his own* ingenuity—imagining himself to be one of the counsel engaged. Does he differ on any points from the reason-

* *Stu. Leg. Ra.*, pp. 14, 15. . “Patience and slowness of belief,” says another writer on legal studies, “are the strongest mark of a sound judgment, and are nowhere more necessary than in the study and profession of the law. The seeming agreement which many cases have with each other, in point of circumstance, is too apt to mislead the warm imagination, and make us fancy there is an exact similitude, where, in fact, there is an essential difference between them.”—*Simps. Reflect.*

ing which lies before him? Let him note down the grounds of such difference—let him, in short, carefully and calmly weigh each in the balance of his own understanding; endeavour to put a particular argument in a more striking point of view—in more cogent terms—to develop some latent objection;—in short, to realise the case, and make it his own. His reasoning powers cannot fail to improve rapidly under this sharp and constant exercise, which transforms a reporter into a learned, and ingenious, and friendly personal opponent. If, instead of this, the student rest satisfied with what he considers a rapid conception of an author's meaning—with a sort of general notion of the scope and drift of a particular argumentation—and make no effort to enter into it as a matter of personal investigation—he will receive but little real practical benefit from the best course of reading that could be devised; he will become one of those, already alluded to, who are “*ever learning, and never able to come to the knowledge of the truth.*”

Thus, then, let the student make a prudent selection of a course of reading, and steadily adhere to it; but in doing so, sedulously and perseveringly labour in the discipline of his mind; keeping in view this contemporaneous exercise—never caring how severely—of his apprehension, his memory, and his judgment: fixing his mind's eye upon a splendid instance of the advantages conferred by early discipline upon a naturally fine intellect—Lord Mansfield;—of whom it is eloquently said, that “he apprehended the facts with such clearness, retained every circumstance with such ease, and weighed the ingredients of equity in so just a balance, that one is at a loss whether to admire most the quickness of his appre-

hension, the strength of his memory, or the soundness of his judgment."

There occurs in an excellent work on legal studies such a vivid picture of the advocate destitute of a "clear and settled judgment," as is calculated to form an instructive *finale* to this chapter.

"How would that advocate appear, who should stand up in a court of judicature, without having acquired a clear comprehension of the nature of his case, and of its various parts and circumstances: wandering from this to that part of his subject, unable to discern what part to produce and what part to retain; fixing, by chance, upon some weak or disjointed member, and then, with an unmeaning solemnity, dragging it forth as the main support of his cause; discovering his mistake only by the impatience of his auditors, and covered with confusion at a sense of his inability to rectify it! Unwilling, however, to terminate his efforts abruptly, he has recourse to his imagination—and this serves only to make his weakness the more conspicuous: his uncertainty increases; he continues to heap words upon words, without meaning or end;—now, in all the violence of anger, he declaims upon the injustice—but *of what*, he cannot tell;—now, he will argue; but, like a man talking in his sleep, he has no single certain position on which to found his argument;—now, he will denounce—now, remonstrate—now, entreat: till at length his speech became a chaos, and nothing but his silence can restore him, and those whom he addresses, to regularity and the light!" *

* Raithby's Letters, pp. 224-5 (2d ed.).

CHAPTER XVIII.

PRACTICAL SUGGESTIONS DESIGNED TO FACILITATE BOTH
THE STUDY AND PRACTICE OF THE LAW.

—*Si quid novisti rectius istis,*
Candidus imperti : Si non, his utere mecum.—HON.

SECTION I.

MAXIMS AND PRINCIPLES.

No one has the least pretension to the character of a scientific lawyer, whose mind is not imbued with its general principles. It is these alone which facilitate at once the acquisition, and the use, of legal knowledge. On this subject we have, however, in the preceding pages, spoken fully and frequently. Our present object is, to point attention to those MAXIMS, in which are embodied, in terse and apposite language, the leading truths and general principles of the law, which have been established and sanctioned by the sagacity and experience of ages, and are perpetually appealed to, in the administration of justice. These maxims are of great value, not merely to the speculative jurist, but the practitioner. In the investigation of legal questions, involving great nicety, and obscure and perplexing details, it continually happens, that a single legal maxim solves the whole difficulty, and enables the lawyer to systematise and arrange conflicting principles, and apparently inextricable

involutions of fact. The more of them, therefore, that the student can *make his own*, the better. Let him, however, bear in mind the caution which we have elsewhere given him as to the *premature* acquisition, and the *incautious* use, of—or rather reliance upon—general principles.* Merely to learn them off by rote, and imagine himself able then to apply them in practice, is a most mischievous, but by no means rare, delusion and absurdity. *His* principles ought to be the results of laborious examination of particular cases—all with a view to extract from them their regulating principle. Let him look for principle in everything; and he will soon obtain a rapid mastery over details which will utterly confound and bewilder others, and successfully encounter the most subtle and unexpected difficulties in argument. The obligation of our English law to that of Rome, is, as we have elsewhere shown, abundantly obvious. There are few of our leading maxims which have not been derived from it.† Some of our judges are pre-eminently happy in applying maxims to the cases brought before them, often thereby in a moment annihilating a long train of sophistical reasoning. Mr. Justice Chambre said, in the case of *Brisbane v. Dacres*, 5 Taunt. 159, that he had “a very large collection of maxims;” and the student should similarly provide himself. Mr. Preston, in his letter to the author, ‡ points out some of the depositories of these

* *Ante*, pp. 689, 690.

† 2 Kent, Comm. 552.

‡ *Ante*, p. 577. One of the works there referred to, is “Branch’s Maxims,” a most useful little collection, the last edition of which was accompanied by a translation, by John Richardson, Esq., of Gray’s Inn. The following, taken at random, are samples of this scholarly performance: ‘*Errores scribentis, nocere non debent*’ [i. e. ‘clerical errors ought not to vitiate’]. “*The mistakes of a man writing ought not to harm!*” p. 47 (4th ed.). Again, “*Omnis nova constitutio futuris temporibus formam imponere debet, non*

maxims. The reader is also referred to Lord Bacon's 'Principal Rules and Maxims of the Common Law'; and to a brief collection of maxims appended to Sir Edward Coke's Second Institute. The author of these pages had long ago meditated an elaborate work upon the maxims of the English law, illustrative of the manner in which they were practically dealt with, in administering Equity, Criminal, and Common Law. He had however abandoned the intention; and he the less regrets it, as there has very recently [1845] appeared a useful work on the same subject, though not exactly upon the plan which the present writer had proposed to himself. The publication alluded to is entitled "A Selection of Legal Maxims, Classified and Illustrated, by Herbert Broom, Esq., of the Inner Temple," in a moderate sized 8vo volume. It is well arranged, and the author has displayed much judgment in treating his subject, and great industry in collecting cases illustrative of the maxims which he has selected. The basis of the work which had been contemplated by the author of the present work, was a collection of maxims taken from the Civil Law; and it may be very convenient to the student to present him with a series compounded out of that collection, and the maxims (upwards of 200) illustrated by Mr. Broom; whose work the student is recommended to procure and peruse in the second year of his pupillage. Most of the following maxims should, indeed, be committed to memory by the student. If he were to copy them into a little book, and carry it about with him, in order that he might perpetually exercise himself in them—not

præteritis [i. e. as Mr. Broom properly translates it, 'A legislative enactment ought to be prospective in its operation, not retrospective']. "*Every new institution should give a form to future times, not to past!*"

with a view to simply remembering them—but to realizing them by *reflection*—he would soon find the advantage which he had derived from them.

Note.—There are a few of the ensuing maxims of the Civil Law, which have not been adopted in the Law of England.

TABLE OF LEGAL MAXIMS.

- A verbis legis non est recedendum.
 Accessorium non ducit sed sequitur suum principale.
 Accessorius sequitur naturam sui principalis.
 Acta exteriora indicant interiora secreta.
 Actio personalis moritur cum personâ.
 Actio pœnalis in hæredem non datur nisi ex damno locupletior hæres factus sit.
 Actor sequitur forum rei.
 Actus curiæ neminem gravabit.
 Dei nemini facit injuriam.
 legis nemini est damnosus.
 facit injuriam.
 non facit reum nisi mens sit rea.
 Ad ea quæ frequentius accident jura adaptantur.
 Ad proximum antecedens fiat relatio nisi impediatur sententia.
 Ad quæstionem facti non respondent iudices, ad quæstionem legis non respondent juratores.
 Edificatum solo, solo cedit.
 Equitas sequitur legem.
 Estimatio præteriti delicti ex post facto nunquam crescit.
 Affirmanti, non neganti, incumbit probatio.
 Aliud est celare aliud tacere.
 Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.
 Ambiguum placitum interpretari debet contra proferentem.
 Apices juris non sunt jura.
 Argumentum ab inconvenienti plurimum valet in lege.
 Assignatus utitur jure auctoris.
 Benignæ faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire.
 Bona fides non patitur ut idem bis exigatur.
 Bona fide possessor facit fructus consumptos suos.
 Boni judicis est ampliare jurisdictionem.

Bonus iudex secundum æquum et bonum iudicat, et æquitatem stricto juri præfert.

Casus omisus habetur pro amisso.

Caveat emptor, qui ignorare non debuit quod jus alienum emit.

Certum est quod certum reddi potest.

Cessante causâ cessat effectus.

ratione legis cessat ipsa lex.

Chirographum apud debitorem repertum præsumitur solutum.

Circuitus est evitandus.

Clausula quæ abrogationem excludit ab initio non valet.

vel dispositio inutilis per præsumptionem vel causam remotam ex
post facto non fulcitur.

Clausulæ inconsuetæ semper inducunt suspicionem.

Cogitationis poenam nemo patitur.

Communis error facit jus.

Conditio illicita habetur pro non adjecta.

Consensus facit matrimonium.

non concubitus, facit nuptias vel matrimonium.
tollit errorem.

Constructio legis non facit injuriam.

Consuetudo ex certâ causâ rationabili usitata privat communem legem.
loci est observanda.

Contemporanea expositio est optima et fortissima in lege.

Contra non valentem agere nulla currit præscriptio.

Copulatio verborum indicat acceptance in eodem sensu.

Corpus humanum non recipit æstimationem.

Crimina morte extinguuntur.

Cui licet quod majus non debet quod minus est non licere.

Cuicumque aliquis quid concedit concedere videtur et id sine quo res ipsa
esse non potuit.

Cuiuslibet in arte sua credendum.

Cuique licet juri pro se introducto renunciare.

Cujus est commodum, ejus debet esse incommodum.

Cujus est dare ejus est disponere.

solum ejus est usque ad coelum.

Culpa lata dolo æquiparatur.

Culpa tenet suos auctores.

Cursus curiæ est lex curiæ.

Dans et retinens nihil dat.

De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error
juris sive facti.

De minimis non curat lex.

De non apparentibus, et non existentibus, eadem est ratio.

Debile fundamentum fallit opus.

Debitor non præsumitur donare.
Debitum et contractus sunt nullius loci.
Decimæ debentur parochæ.
Delegata potestas non potest delegari.
Delegatus non potest delegare.
Deus solus heredem facere potest, non homo.
Dies dominicus non est juridicus.
Dies inceptus pro completo habetur.
Dies incertus pro conditione habetur.
Dies interpellat pro homine.
Dolus auctoris non nocet successori.
Dolus circuitu non purgatur.
Dominium not potest esse in pendenti.
Dominus aliquando non potest alienare.
Domus sua cuique est tutissimum refugium.
Dona clandestina sunt semper suspiciosa.*
Donatio non præsumitur.
Ecclesia decimas solvere ecclesiæ non debet.
Ejus est periculum cujus est dominium—aut commodum.
Ex antecedentibus et consequentibus fit optima interpretatio.
Ex dolo malo non oritur actio.
Ex facto oritur jus.
Ex maleficio non oritur contractus.
Ex multitudine signorum colligitur identitas vera.
Ex nudo pacto non oritur actio.
Ex turpi causâ non oritur actio.
Exceptio falsi est omnium ultima.
Exceptio probat regulam in casibus non exceptis.
Exceptio quæ firmat legem, exponit legem.
Excusat aut extenuat delictum in capitalibus quod non operatur idem in civilibus.
Executio juris non habet injuriam.
Expressio eorum quæ tacitè insunt nihil operatur.
Expressio unius est exclusio alterius.
Expressum facit cessare tacitum.
Falsa demonstratio non nocet.
Fiat justitia, ruat cælum.
Fictio legis iniquè operatur alicui damnum vel injuriam.
Fortior et potentior est dispositio legis quàm hominis.
Frater fratri uterino non succedet in hæreditate paternâ. [Nunc aliter. *Vide* Stat. 3 & 4 Will. IV., c. 106, § 9.]
Fraus latet in generalibus.
Frustra petis quod mox es restitutus.
Frustra probatur quod probatum non relevat.

Furiosus solo furore punitur.

Generalibus specialia derogant.

Hæreditas nunquam ascendit. [Nunc aliter. Vide Stat. 3 & 4 Will. IV., c. 106, § 6.]

Hæres est eadem persona cum defuncto—pars antecessoris.

Hæres hæredis mei est meus hæres.

Hæres legitimus est quem nuptiæ demonstrant.

hæredis succedit in universum jus quod defunctus habuit.

Id nostrum solum quod debitis deductis est nostrum.

Id tantum possumus quod de jure possumus.

Idem est non esse et non apparere.

Ignorantia eorum quæ quis scire tenetur non excusat.

facti excusat,—Ignorantia juris non excusat.

Impotentia excusat legem.

In sequali jure melior est conditio possidentis.

In alternativis electio est debitoris.

In claris non est locus conjecturis.

In contractis tacitè insunt quæ sunt moris et consuetudinis.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradûs.

In disjunctivis sufficit alteram partem esse veram.

In dubio pars mitior est sequenda.

In dubio pro dote,—libertate—innocentia—possessore, debitore—reo—respondendum est.

In dubio sequendum quod tutius est.

In favorabilibus, annus inceptus pro completo habetur.

In fictione juris semper sequitas existit.

In jure non remota causa sed proxima spectatur.

In pari delicto potior est conditio possidentis.

In Angliâ non est interregnum.

Incommodum non solvit argumentum.

Index animi sermo.

Interest reipublicæ ut sit finis litium.

Judicium a non suo judice datum nullius est momenti.

Jura eodem modo destituuntur quo constituuntur.

Jus ex injuriâ non oritur.

Jus in re inhæret omnibus usufructuarii.

Jus non patitur ut idem bis solvatur.

Jus publicum privatorum pactis mutari non potest.

Jus respicit æquitatem.

Jus superveniens auctori accrescit successori.

Legatum generis perit hæredi ;—legatum speciei perit legatario.

Leges posteriores priores contrarias abrogant.

Lex neminem cogit ad vana, inutilia aut impossibilia.

plus laudatur quando ratione probatur.

Lex semper dabit remedium.

spectat naturæ ordinem.

Linea recta semper præfertur transversali.

Locum facti impræstabilis subit damnum et interesse.

Majori inest minus.

Majus dignum trahit ad se minus dignum.

Mala grammatica non vitiat chartam.

Maledicta expositio quæ corrumpit textum.

Malitia supplet ætatem.

Malus usus est abolendus.

Matrimonia debent esse libera.

Mæsis sementem sequitur.

Misera est servitus ubi jus est vagum aut incertum.

Modus de non decimando non valet.

et conventio vincunt legem.

legem dat donationi.

Multa in jure communi contra rationem disputandi pro communi utilitate
introducuntur.

Multa non vetat lex quæ tamen tacite damnavit.

Necessitas inducit privilegium quoad jura privata.

publica major est quàm privata.

quod cogit defendit.

Nemo cogi potest præcise ad factum, sed in id tantum quod interesse.

Nemo debet ex alienâ jacturâ lucrari.

Nemo debet bis puniri pro uno delicto.

vexari pro unâ et eadem causa.

esse judex in propriâ causâ.

Nemo est hæres viventis.

patriam in quâ natus est exuere nec ligeantiz debitum ejurare possit.

potest plus juris ad alium transferre quam ipse habet.

Nemo ex suo delicto meliorem suam conditionem facere potest.

Nemo mori potest pro parte testatus, pro parte intestatus.

Nemo præsumitur donare.

Nemo præsumitur malus.

Nemo præsumitur ludere in extremis.

Nemo tenetur jurare in suam turpitudinem.

Nihil quod est inconueniens est licitum.

tam conueniens est naturali æquitati quàm unumquodque dissolvi eo
ligamine quo ligatum est.

Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit.

Non accipi debent verba in demonstrationem falsam quæ competant in limi-
tationem veram.

Non creditur referenti nisi constet de relato.

Non exemplis, sed legibus, judicandum.

Non jus sed seaisina facit stipitem.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.
rex gratiam facere cum injuriâ et damno aliorum.

Noscitur a sociis.

Nova constitutio futuris formam imponere debet, non præteritis.

Novatio non præsumitur.

Nullâ pactioni effici potest ut dolus præstetur.

Nulla sasina, nulla terra.

Nullum tempus occurrit regi.

Nunquam concluditur in falso.

Nunquam præscribitur in falso.

Officium nemini debet esse damnosum.

Omne majus continet in se minus.

Omnia præsumuntur contra spoliatores.

rite et solenniter esse acta donec probetur in
contrarium.

Omnis innovatio plus novitate perturbat quam utilitate prodest.

Omnis rati habitio retrò trahitur et mandato priori sequiparatur.

Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui
minimum sibi.

Optimus interpres legum consuetudo.

rerum usus.

Pacta privata juri publico derogare non possunt.

Partus sequitur ventrem.

Pater est quem nuptiæ demonstrant.

Paterna paternis, materna maternis.

Patrem sequitur sua proles.

Pendente lite nihil innovandum.

Periculum rei venditæ, nondum traditæ, est emptoris.

Plus valet quod agitur quam quod simulate concipitur.

Possessio fratris de feodo simplici facit sororem esse hæredem. [Vide
nunc Stat. 3 & 4 Will. 4, c. 106.]

Posteriora derogant prioribus.

Potior est conditio possidentis—prohibentis—defendentis.

Præsentia corporis tollit errorem nominis; et veritas nominis tollit errorem
demonstrationis.

Primus actus judicii est judicis approbatorius.

Prior tempore potior jure.

Privatum incommodum publico bono pensatur.

Privilegium contra rempublicam non valet.

Probatæ extremis præsumuntur media.

Pro possessore habetur qui dolo desiit possidere.

Protectio trahit subjectionem et subjectio protectionem.

Provisio hominis tollit provisionem legis.

Quæ non valeant singula juncta juvant.

Quæ temporalia ad agendum, sunt perpetua ad excipiendum.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.

Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.

jus domini regis et subditi concurrunt jus regis preferri debet.

plus fit quam fieri debet videtur etiam illud fieri quod faciendum est.

res non valet ut ago valeat quantum valere potest.

Qui approbat non reprobat.

Qui cum alio contrahit, vel est, vel debet esse conditionis ejus non ignarus.

Qui ex damnato coitu nascuntur inter liberos non computantur.

Qui hæret in literâ hæret in cortice.

Qui in utero est, pro jam nato habetur, quoties de ejus commodo queritur.

Qui jussu judicis aliquid fecerit non videtur dolo malo fecisse quia parere necesse est.

Qui non habet in ære luat in corpore.

Qui per alium facit per seipsum facere videtur.

Qui providet sibi providet hæredibus.

Qui rationem in omnibus quaerunt rationem subvertunt.

Qui sentit commodum sentire debet et onus.

Qui sentit onus sentire debet et commodum.

Qui suum recepit, licet a non suo debitore, non tenetur restituere.

Qui tacet consentire videtur.

Quicquid plantatur solo solo cedit.

Quilibet potest renunciare juri pro se introducto.

Quisquis est rei suæ moderator et arbiter.

Quod ab initio non valet in tractu temporis non convalescit.

Quod fieri non debet factum valet.

Quod fieri debet facile præsumitur.

Quod inesse debet inesse præsumitur.

Quod meum est, sine me alienum fieri nequit.

Quod non apparet non est.

Quod non habet principium non habet finem.

Quod nullius est, est domini regis.

id ratione naturali occupanti conceditur.

Quod nullius est, fit domini regis.

Quod nullius est, fit occupantis.

Quod remedio destituitur ipsâ re valet si culpa absit.

Quod statim liquidari potest, pro jam liquido habetur.

Quod sub certâ formâ concessum vel reservatum est non trahitur ad valorem vel compensationem.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.

Reipublicæ interest voluntates defunctorum effectum sortiri.

Res inter alios acta alteri nocere non debet.

Res judicata pro veritate accipitur.

perit suo domino.

Resoluto jure dantia, resolvitur jus accipientis.

Respondet superior.

Res perit domino.

Res sua nemini servit.

Rex non potest peccare.

nunquam moritur.

Salus populi suprema lex.

Scientia utrinque par pares contrahentes facit.

Scire debes cum quo contrahis.

Scire et seire debere sequiparantur in jure.

Scribere est agere.

Sic utere tuo ut alienum non lædas.

Simplex commendatio non obligat.

Spoliatus ante omnia restituendus.

Stabit præsumptio donec probetur in contrarium.

Summa ratio est quæ pro religione facit.

Summum jus, summa injuria.

Tenor est qui legem dat feudo.

Testimonia ponderanda sunt, non numeranda.

Transit terra cum onere.

Ubi eadem est ratio eadem est lex.

ratio ibi idem jus.

jus ibi remedium.

Utile per inutile non vitiatur.

Verba chartarum fortius accipiuntur contra proferentem.

generalia restringuntur ad habilitatem rei vel personam.

illata inesse videntur.

Verba posteriora propter certitudinem addita ad priora quæ certitudine

indigent sunt referenda.

relata hoc maximè operantur per referentiam ut in eis inesse videntur.

Via trita via tuta.

Vicarius non habet vicarium.

Vigilantibus non dormientibus jura subveniunt.

Volenti non fit injuria.

Voluntas est ambulatoria usque ad mortem.

Voluntas reputatur pro facto.

SECTION II.

HOW TO ACQUIRE READINESS AND ACCURACY IN THE APPLICATION OF LEGAL PRINCIPLES.

If legal principles could be *applied* as easily as they are acquired, there would be an end of the greatest difficulty which is experienced in prosecuting the legal profession. "Practice makes perfect" in this respect, as in every other ; and should the student not have the opportunity of seeing sufficient practice in chambers, he must make practice for himself—by *imagining cases of ordinary occurrence* submitted to him for an opinion. Let us suppose him, for instance, to have carefully read and reflected upon the law of self-defence, as thus stated in Blackstone:—

"The first species of redress of private injuries which is obtained by the act of the party himself, is the defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these, his relations, be forcibly attacked, in his person, or property, it is lawful for him to repel force by force ; and the breach of the peace which happens, is chargeable upon him only who began the affray."*—Let him now put such simple cases to himself as the following, and endeavour to apply the above principles to them, with as much precision as if his opinion were actually asked by a client.

Suppose, while a man is riding on horseback, another should beat the *horse*, from which the rider is obliged to dismount for fear of being thrown ; would he be justified in

* 3 Bla. Co. 3—4.

horse-whipping the offender? [See 1 Mo. 24 ; 1 Siderfin, 438.] Or, suppose, that while a gentleman and his wife were riding on horseback on the high road, a man were to commence violently shouting, obviously intending to alarm the lady's horse, and persisted in doing so in spite of earnest remonstrance, till the horse began to rear and plunge violently: would the gentleman be justified in riding him down, if he could not otherwise put a stop to such dangerous uproar?

Would a man be justified in knocking down one whom he saw *in the act* of aiming a blow at one of his most costly mirrors?

If one, seeing at a little distance, a man threatening to strike his little sister, were to rush up and strike the man, would he be liable to an action?

If a father were to come up the instant *after* his child had been struck by a man, and, in the frenzy of alarm and passion, were, without knowing whether his child had actually been struck, to knock down him who had struck it, —would the father be liable to an action?

Thus let him go on imagining cases occurring among husbands and wives, parents and children, masters and servants, and others—accustoming himself, in short, to the prompt application of legal principles, not only in such cases as those above instanced, but in all the little occurrences and transactions of business which might lead to litigation. Suppose, for instance, a tradesman who has undertaken to repair a chronometer by a particular day, fail to *complete* the repairs by that day, and his customer—an East India captain—should call for it, just before setting sail for India; can he insist on having his chronometer in its unfinished state, without paying the tradesman anything—or can the latter insist upon being paid for the

little that he has actually done?* Or suppose a man were to give another a cheque on his banker, which was not presented in time, would the banker be justified in paying it?† Or suppose a banker—or the holder of a bill—were to pay it *before* it was due?‡—A fertile fancy can never be at a loss for such means as these, of exercising the mind, in the application of legal principles, and thus preparing it for the ready and skilful discharge of actual business. Thus our student, if in right earnest in his studies, may either when at chambers, or even while *walking*, whether alone, or in company with “like-minded friends,”—find

“Books in the running brooks,
Cases in stones, and—*law* in everything!”

Another expedient may be mentioned, easier, but not less useful, than the foregoing. Let the student, after having carefully mastered the details of a particular case in the Reports, *frame variations of particular circumstances, and consider what would have been the effect* of such an altered state of facts. Let him imagine himself conducting such a case in court, when it took such an unexpected turn as that suggested, would that turn have varied the rule of law previously applicable to it, or not? Introduce—suppress—vary particular facts; will it signify? Suppose the woman had married, at a particular moment—or a man become bankrupt in the midst of certain transactions—or one of several partners had retired or become insolvent—that a certain document had been missing—or a sentence omitted or changed, &c.—what would, in any of such events, have been the precise situation of the parties?

* See *Sinclair v. Bowles*, 9 B. & C. 92.

† See *Serle v. Norton*, 2 Moo. & Rob., 401 (*et Notae*).

‡ It would be highly imprudent and dangerous to do so. *Vide* Smith's Merc. Law, 239 (3rd ed.), and Chitty on Bills, 260, 395 (9th ed.).

Take, for instance, the first case which occurs to us—that of *Carvalho v. Burn*, 4 B. & Adol. 382. A, who resided at *Liverpool*, was in the habit of making consignments of goods to B, his agent in South America, for sale; on the faith of, and against which, consignments, A drew bills proportioned to their amount, to be paid by B, his agent, out of the proceeds—and the bills were negotiated by the indorsements of C, A's correspondent in *London*. Some of the bills so indorsed were refused acceptance by B. C, on receiving information that they had been so dishonoured, requested that A would order B in case he did not pay A's drafts, immediately to hand over to C's agent, *such property as B had of A's*, equivalent to the bills, *which should not be paid by B*; and A agreed to do so. Thus far all is plain sailing. Let the student, now, imagine the death, or bankruptcy, of A, B, or C, either before or after the accepting or indorsing the bills—or the consignments of goods—or otherwise vary the arrangements between the parties, and see what would then be their respective rights and liabilities. Let us, for instance, put the case which actually happened, viz., that A, between the time of giving his order, to transfer the goods, and that of the arrival of that order in South America, had become bankrupt,—what would be the consequence of such an event?—Did the bargain between A and C operate as an *assignment* of the property in A's goods, then held by his agent B? Or did the goods continue to be A's property at the time of his bankruptcy, and consequently go to *his assignees*?*—Or suppose that

* The latter was held to be the case, on the ground that there is a difference, as against the assignees of the bankrupt assignor, between an equitable assignment of *chattels specifically ascertained*, and an agreement to satisfy a particular demand by the transfer of an equivalent portion of chattels not

B had, before the receipt of the order, *sold* the goods, and the order had been for so much of the *proceeds* as would cover the debt due to C; would C have been, under *these* circumstances, entitled to the money? *

There cannot be a better preparative than this, for the student who meditates an early entrance into court. He will have been so accustomed, as it were, to take *himself* by surprise, that he will be prepared for the "chances of the war,"—he will suffer *no one else* to take him by surprise. If a judge suddenly propose to him an ensnaring question, he will be ready and dexterous, while another would be *posed*, and either faintly stammer forth a ridiculous reply, or sink, in silly silence, into his seat. A small affair of this kind once happened—*inter nos*—to the author. He had occasion, soon after commencing practice as a pleader, to appear before a judge at chambers; and had arranged in his mind a "neat and appropriate" statement of the case—which he was about to commence, when an ugly query, varying the aspect of facts, in a very alarming way, was started by his Lordship:—whether or not the author acquitted himself satisfactorily, he sayeth not: but well recollects blessing himself, that he was not in open court, but at a dingy little chamber at Serjeants' Inn, and before a very good-natured judge! On returning to chambers, he happened to cast his eye upon a passage in a familiar text-book, which had he but recollected it five minutes before,—why—

It is so constantly now the habit with the judges, to

specifically ascertained. The case in the text was affirmed by a Court of Error. See 1 Ad. & Ell. 895; and as to the principle thereby established, see Smith's Merc. Law, p. 615, and *ib.* note (o), 3d ed.

* See *Crowfoot v. Gurney*, 9 Bing. 372, and *Best v. Argles*, 4 Tyr. 256.

interrupt counsel in the course of their argument, by suggesting questions, and putting cases, which are often very trying and dangerous to those who have not either had long experience, or have accustomed themselves to *continuous* reading and thought in private, that it is comparatively useless to prepare a complete argument beforehand. Nothing is a more satisfactory test of legal ability, however, than the readiness with which such sudden and unexpected objections are answered. If the train of a man's ideas be on these occasions altogether interrupted—it is clear, either that he is not sound and firm in his law, or lacks that clear-headedness, confidence, and presence of mind, which are essential to forensic success.

While, however, the student is anxious to acquire the habit of looking at facts in a legal point of view, he is cautioned against pushing it too far, and falling into a captious, quibbling, *crotchety* humour. He must remember that there is a *common sense* view to be taken of even the most complicated facts—one which the judges themselves are always anxious to take, and to present to a jury. *Medio tutissimus ibis*. Many men are very successful at the bar, especially at Nisi Prius, merely through possessing this valuable faculty.

SECTION III.

HOW TO ACQUIRE A FACILITY OF REFERENCE.

"KNOWLEDGE is of two kinds," said Dr. Johnson;* "we know a subject ourselves, or we know *where we can find* information upon it."

This is especially applicable to the study and practice of the law: for in the vast multiplicity of its topics, what memory can, especially in the early stages of study or practice, pretend to an adequate familiarity with a thousandth part of it? A *facility of reference* will in a great measure compensate for this deficiency—and as the acquisition of that facility may certainly be expedited, it will be the Author's endeavour, in this section, to offer a few little practical expedients and suggestions, toward the advancement of so desirable an object.

When a "case" is put into the hands of the young student, unless his tutor happen to be near, to assist him, he will be often utterly at a loss in what direction to look for *the law* on the subject—and may possibly spend hours in turning over book after book, in the vain hope of lighting upon something "in point." Few things are so calculated to fret and dishearten a student, as frequent unsuccessful researches of this kind. Let, therefore, one of his earliest objects be to familiarise himself with the *leading heads* of law, so that, on reading over any statement of facts, he may at least know in what quarter to look for information—as, Principal and Agent—Stoppage in Transitu—Tender—Set-off—Agreements—Bills of Exchange—Death of Parties—&c., &c., &c., as enumerated

* Boswell's Life of Johnson, vol. iii. p. 75.

in the Table of Contents in any of the leading works of reference.

He must make a practice of carefully running his eye over the chief and sub-divisions, down to the very sections, and endeavour to retain as distinct an impression as he can, of the kind of matter to be found in each. When he has been led into a long and close investigation on any particular point, let him endeavour to bear in mind—so to speak—the traces of the country he has quitted, in order that, on a future visit, he may be able to find his way about readily. Let him strive to recollect the trains of thought—the suggestions and associations which led him from step to step in his researches, till at length he discovers what he sought; an effort this which, constantly repeated, must not only serve to fix in his mind valuable information, but also sensibly improve his memory. When any statement of facts is laid before him for an opinion, the student must as he goes over it, strive to refer particular topics to their appropriate departments: *e. g.*—"Waiver of notice to Quit—Sale of goods by sample—Principal's right as against agent—Admission by agent," &c. It may be perhaps a somewhat intricate mercantile case respecting an agent's sale of goods by sample; in which the buyer disputes, *inter alia*, the right of the undisclosed principal to maintain an action, &c. &c. Possibly the pupil had, not long ago, occasion to go over the whole province of Principal and Agent law, and recollects the precise spot where there is a little heap of decisions on the main point in his present case—viz. the *subsequent recognition* of his agent's authority, by an undisclosed principal. Thither, therefore, he turns—finds a case—say *Grogan v. Wade*—underscored; and on turning to that case in 2 Starkie's Reports, p. 443, dis-

covers the fruit of some previous researches, in the shape of four or five *ms.* notes of recent decisions—one of them exactly in point on the present occasion—and thus, it may be, further investigation is rendered unnecessary; inasmuch as all the seller's objections depended upon this one, which has been demonstrated to be untenable. If, however, our student be not pressed for time, he will make a point of considering the whole case, just as carefully as though he had not made any such discovery of a governing decision as that above mentioned; for it must be a rule with him to omit no opportunity of thoroughly investigating a case, of hunting about for authorities, and endeavouring to apply them to facts. This is the way to get a *facility of reference*; and is it not preferable to the silly habit which some pupils have of running—scared with the first sight of a case—to pester their pleader with the hurried inquiry—"Where shall I get anything about it?"—Surely the pleader should reply, as did the mother of Sir William Jones to her splendid son, "*Read, and you will know.*"—Ask any pleader or conveyancer who has had the greatest experience with pupils, and he will tell you that the best class of pupils give the least trouble to their tutors.

"The best book of reference," justly observes the editor of Wynne's *Eunomus*, "is *COMYN'S DIGEST*." With this great storehouse of law, of which we have already elsewhere* spoken, the student must be at uncommon pains to familiarise himself; striving to know every chamber of it, every closet in every chamber, every shelf in every closet, and also the contents of every shelf—so that he may be able, as the saying is, to "find his way to it in the dark." Thus will he not only be able to refer at once to all the

* *Vide ante*, p. 778, *et seq.*

existing law, but be enabled duly to distribute the products of the current sittings in Banco—the new *reports*. It is impossible to speak in too high terms of this noble monument of the Lord Chief Baron's prodigious learning. We have already cited some testimonies to this effect. "It is a production," says Chancellor Kent, "of vastly higher order and reputation than that of Viner—and the best Digest extant upon the entire body of the law."* "In this admirable collection," says Dr. Woodeson, "the usual method pursued of conveying the doctrine on any subject, is, to set down a general position, then to illustrate it by examples, and finally to restrain it by exceptions: all of which is done with remarkable clearness and conciseness of expression, and the information desired is seldom long sought after, or in vain."†

The late Mr. Justice Littledale (a profound lawyer) was so thoroughly intimate with every part of Comyn's Digest, that he seemed to find something in it directly in point, whatever might be the case argued before him: and, when Counsel, while arguing, heard him whisper from the Bench, "Usher, get me Comyn's Digest, title *Officer*" (or whatever else it might be), he was seen in a few moments to be *hit* by some missile from the Digest!—If the student would sit down, study, and draw, up a kind of tabular view of any particular head of Comyn's Digest,—say that of "Action on the Case for Defamation"—with a view of ascertaining the author's system and method of distribution, he would speedily be convinced of the justice of the eulogiums above cited, and be stimulated to a further and more minute investigation. There is, however, one little impediment to be found in the Lord Chief Baron's con-

* 1 Kent, Comm. 510.

† Elem. of Jurispr. p. 103.

stant adoption of obsolete Norman French words for the headings of particular articles. Who would think, for instance, of hunting for information concerning *tithes*, under the head of "*Dismes*;" *goods and chattels*, under "*Biens*;" deeds, under "*Fait*;" *highways*, under "*Chemin*;" for the signification and construction of particular *words* and phrases, under "*Parols*?" This little obstacle, however, may be soon surmounted by a little perseverance. There is, besides, an *index verborum* prefixed to the later editions, which will serve to guide the pupil, by the modern terms, to those more ancient, which head particular sections.

One other suggestion is offered to the student, and it is reserved for the last, on account of its special importance. Let the student—or rather young practitioner—set himself down resolutely to the task of reading, with the utmost care, each new number of the Reports; and after *noting up* every decision, *i. e.* minuting it on the margin of some previous case in the Reports, which it materially affects—either corroborating, over-ruling, or qualifying it—distribute their contents under their appropriate heads in any favourite text-book. It is only by some such means as these, that the young practitioner can attempt to keep pace with the decisions which now, truly,

— "Come not single spies,
But in battalions."

SECTION IV.

HINTS FOR FACILITATING THE MASTERY OF COMPLICATED CASES.

"Je veux parler seulement," says M. Renouard *, "de cette aptitude pratique qui découvre promptement le siège des difficultés, prend un parti sur leur solution, écarte les circonstances étrangères et les accessoires inutiles, s'appuie à propos sur des axiômes généralement admis, et sur des exemples non contestés, qui, sans posséder parfaitement les sources de la doctrine, sait du moins y recourir sans embarras, et les consulter avec fruit.

"Pour acquérir cette aptitude, et le degré de science qu'elle exige, l'usage des affaires est le supplément indispensable, des leçons puisées dans les écoles, et même des meditations, du cabinet.—Cet apprentissage pratique est une préparation que rien ne saurait complètement remplacer, et qui doit nécessairement précéder l'exercice de la profession d'avocat."

Some minds have naturally a wonderful aptitude for mastering the most intricate combinations of facts—seeing at a glance their true bearings, and remembering them with accuracy for almost any length of time. This is a very rare and valuable quality in a lawyer—one which will enable him to discharge the most arduous professional duties with ease and rapidity. Attention, and judicious exercise, however, will give a high degree of this power to even those who have long, and with reason, despaired of acquiring it—who have long had to lament the want of a clear and comprehensive intellect. He who is in this situation, and

* *Thémis*, IV.

would better himself, must not only *begin well*, but “persevere in well doing :” and that he may do this effectually, he is requested to attend to the following brief suggestions :

Let the student address himself to any statement of facts, or arguments, either in the books or in actual business, with calmness and deliberation,—not permitting his mind to wander, or hurry over details even apparently the most insignificant. It requires much skill and experience to know what facts are, and what are not, insignificant; and the student must wait for some years, before he undertakes such a decision—at *first sight*. Let him read right through the statement from the beginning to the end ; and in doing so, make any little notes or marks he pleases, in order to assist his recollection of what appears to be of leading importance. Then let him cast off his eye, and strive to go over the whole in his mind—a habit which will be attended with several advantages. It will teach him forcibly the frailty of his own powers—his indistinctness of apprehension, his feebleness of memory. Before he undertook this ordeal, he probably fancied himself in perfect possession of what he had read—that he retained a distinct and orderly recollection of the whole, when—alas, mortifying fact!—he finds himself, on being put to the trial, utterly at fault ; scarce a trace clear—but all indistinctness, confusion, and error. Is not this, then, calculated to startle him into strenuous efforts to remedy so serious and fundamental a deficiency?—A second perusal will probably clear up many—a third, may dissipate *all* obscurities : he will then have his case fully in his mind—so that he could undertake to state it even in open court, before judge and jury : and having thus mastered the facts, he will not find much difficulty in applying to them the law. Let the student per-

severe in this course for a little time, and he will soon find how it has quickened and invigorated his powers. It will enure him to habits of patient investigation, accurate discrimination, tenacious retention, and decisive judgment. He will be no longer under the distressing necessity of reading a thing, on perhaps the most urgent occasions, three or four times over, before he can '*take it in*,'—as the phrase is—each time letting slip more than before,—till he is fatigued, irritated, and confused, beyond the power of recovery, and has justly earned, perhaps, the ruinous character of "a *muddle-headed fellow*."

Discrimination must be used in choosing the *subjects* of such exercises as these. Those cases must be first selected which are comparatively short and simple, and gradually those more difficult and complex, or the student will get discouraged from going on with this wholesome process. Imagine a young and volatile, but anxious student, set to work upon such cases as are to be found, for instance, in Bankruptcy and Partnership! Cases, too, which are not prepared beforehand for investigation, with their perplexing superfluities stripped off, by the experienced hand of a reporter! Let not the student be too anxious to take in the whole details of his heavier cases, at once. The effort may be too great for his unpractised powers. Let him split such cases into parts, and master each separately, before proceeding to the other, or considering their general effect in combination.

Let the student, lastly, never think of looking for the *law* applicable to a case, before he shall have obtained this accurate and thorough knowledge of the *facts*. How can he come to correct conclusions from premises not even half understood, or totally misunderstood? A single cir-

cumstance in a long chain of facts, lost sight of, or misapprehended, will often invalidate all his reasonings, insuring vexation to himself, and defeat to his client. "First catch your fish," says the astute Mrs. Glasse, "and then cook it:" and so say we to the student: "first fix the *facts* in your mind, and *then* deal with them according to *law*."

SECTION V.

HOW TO PROMOTE DISTINCTNESS OF THOUGHT AND RECOLLECTION.

THIS is a quality essential, of course, to the successful study of any science; but there are reasons why the want of it is peculiarly felt by legal students, and why its attainment is a matter of great difficulty. It is certainly a much rarer quality than is generally imagined—and he is often most signally destitute of it, who is least conscious of the fact. The very nature of legal science contributes to this—for its general principles, though their deep foundations are reason and justice, are fettered and restricted by such subtle distinctions—they admit of such endless exceptions and modifications, as often to prevent anything like a clear and distinct knowledge of their proper character and functions, at least in the case of beginners. The science of the law thus apparently expands into a vast series of details—details barely distinguishable from one another by the most practised powers of discrimination. The facts, again,—often very imperfectly stated,—are always varying, frequently only by shades of difference scarcely perceptible; and are sometimes so perplexed and intricate,

that unless extraordinary effort be made, the mind loses sight of the governing facts—the leading details,—and floats away amid a haze of minor circumstances. This requisite accuracy of discrimination, the student is, too often, indisposed to give, chiefly because he is distracted and confounded with the vast number, variety, and difficulty of the topics he has to deal with—of the knowledge ever to be yet acquired, and is apt to make eager and hasty efforts to “get over the ground”—without pausing to reflect *how*, or adverting to the possibility of his having to traverse it again. “They,” says some quaint but shrewd writer, “that read and write *cursim et properantes*, are like pilgrims, who have many hosts, and few friends—read much, and understand little.” He is perhaps inclined to rest satisfied with a mere glance at his subject, if he can by that means get rid of the individual emergency—and procrastinates thus from day to day, from week to week, from year to year, the task of going a second time over the ground, in order to acquire a better knowledge of it. He may be compared to a glutton, whose object is quantity, not quality—the greatest quantity devoured in the shortest time: and may be addressed in the words of Bishop Hall,—“How much better is it to refresh yourself with many competent meales, than to buy one day’s gluttony with the fast of many?”

Thus our student may eat of fifty dishes without appreciating the flavour, or receiving nourishment from one; and is, besides, by-and-by, laid up with fits of mental indigestion, which at length recur so often as to impair both appetite and health. There is, in this respect, no difference between physical and intellectual indigestion.*

* “Our reading keeps proportion with our meats,” says Phillips, “which if it be swallowed whole, is rather a burthen than nourishment. ‘*Quod in*

The necessity too, which has been elsewhere alluded to, of rapidly passing from one subject to another, in actual business, is another fertile source of indistinctness and superficiality. Students and young practitioners, not calm and confident in their own resources—not sufficiently stored with accurate and well-arranged information, nevertheless somehow contrive to find themselves in perpetual bustling activity—ever “up and doing.” They do little more, for instance, than hastily cast their eye over the marginal abstracts of the new Reports, even of the most important decisions—or deposit them, it may be, in some text-book, resolving to recur to them at a more “convenient season”—relying upon finding them there when wanted, ready for use; and making thus no effort to incorporate each new ingredient with the existing stock of their knowledge. Can it be wondered at that such people—“lawyers in haste”—are always confused and overwhelmed? That a perpetual series of such slovenly and superficial acquisitions at once impairs their powers, and vitiates their knowledge—spreading a thick haze over everything? Such persons have a faint recollection, on a question being asked which requires a prompt and accurate answer, of a particular decision—they “know there is such an one”—but they are “not quite sure what was the precise point decided”—“satisfied it was *something*—nay, a good deal—like the present,” &c. &c.: and if they cannot succeed in discovering it at the moment, will perchance blurt out a confident answer, as if from sudden

corpore nostro videmus operari naturam,’ saith Seneca, ‘*alimenta quæ accipimus, quamdiu in eâ qualitate perdurant, et solida inatant stomacho, oneri sunt; at cum ex eo quod erant mutata sunt, tunc demum in vires et sanguinem transeunt. Idem in illis quibus aluntur ingenia præstamus, ut quocumque hausimus non patiamur integra esse, ne aliena sint coquamus illa, alioquin in memoriam ibunt, non ingenium.*’”—*Stu. Leg. Ra.* pp. 186-7.

recollection of the substance of the decision—and thus perhaps very seriously mislead a client, and expose themselves. Those who will not strenuously and perseveringly cultivate this intimate and exact knowledge, this accurate recollection of what they have read, are apt to fall into very mortifying dilemmas. But a short time ago, a young barrister cited a case in court, very confidently, as deciding—so and so; but on the judge asking him to point out the case, and hand up the report, our friend found, to his unspeakable mortification and alarm, that he had represented the case as *exactly the reverse* of what it really was. The judge looked somewhat distrustfully on the embarrassed counsel, admitted his explanation, but cautioned him to *look*, another time, before he leaped!—Now let our student keep this little instance in view, while dealing with the slippery matters of law. Surely *five* leading cases, recollected with accuracy, are worth 500 imperfectly understood.* *Attentive reading, frequent reflection upon whatever is read, and application of it to business, are the only guarantees of distinctness of thought and recollection.* “As reason,” says Lord Coke, “is the soul of the law, it cannot be said that we know the law, until we apprehend the reason of the law; that is when we bring the reason of the law so to our own reason, that we perfectly understand it as our own; and then, and never before, we have an excellent and inseparable property and ownership therein, so as we can neither lose it, nor any man take it from us: and we shall be thereby directed very much, the learning of the law being chained together in many other cases. But if by his study and industry the student make not the *reason* of the law HIS OWN, it is

* “One book,” says Phillips, “well digested, is better than ten hastily slubbered over.”—*Stu. Leg. Ra.* 188.

not possible for him to retain it in memory: for though a man can tell the law, yet if he know not the reason thereof, he will soon forget his superficial knowledge; but when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of the particular case, but of many others: for *cognitio legis est copulata et complicata*; this knowledge will long remain with him."*—Let the student, on discovering any leading case, devote his utmost efforts to the mastery of it, in all its particulars—and make frequent *reference* to it, in order to test the accuracy of his recollection of it. Let him keep a list of such cases always beside him, and frequently inquire of himself thus: 'Saunders v. Wakefield, 4 B. & Ald.—what did that decide?—*Guarantee* must contain *consideration* for promise.' 'Daves v. Peck, 8 T. R.—Carrier, consignor and consignee—general principle that the latter must sue carrier for loss.' 'Lickbarrow v. Mason, 2 T. R.—No right of stoppage *in transitu* as against *bond fide* assignee of consignee,'—&c. &c. The great advantage of this will be very soon discovered by the student. If he know a leading case well, all he has to do, on an emergency, is to turn to it in the list of cases in some approved treatise or digest, and he will find it surrounded by all its kindred and more recent cases. Pursue a similar course with reference to *statutes*. Select those which are of leading practical importance, such as the statute of Wills—of Uses—of Entails—of Frauds; and having carefully weighed all the most material parts of them, and considered the questions which have been raised, and interpretations

* 1 Inst. 394 b.—183 b.

which have been put upon them, minute down in a note-book, the substance of each section, *as nearly as possible in the words of the act*. This will require, however, the greatest care. Very serious omissions have been made even by those most skilled in abridging and condensing statutes.*

If any young reader should consider such labours as these excessive and unnecessary, let him try to state accurately the substance of some of those cases and statutes with the *names* and *titles* of which he is most familiar—and he may be less disposed to undervalue the importance of the hints here offered for his guidance. Again and again would we call the student's attention to

* A remarkable instance of the necessity of using caution in abridging statutes, occurs in the abridgment of the Factor's Act, 6 Geo. IV. c. 94, in Abbot on Shipping, p. 381 (5th ed. 1827). This abridgment has always been considered so well executed, that it has been adopted, with but little variation, in every succeeding treatise; and yet one short phrase is omitted, which materially alters the sense of the entire enactment. Lord Tenterden's abridgment, in the work in question, is as follows:—"A person entrusted with and in possession of a bill of lading, or any of the warrants, certificates, or orders mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, or *the deposit or pledge thereof* [AS A SECURITY FOR ANY MONEY OR NEGOTIABLE INSTRUMENT—omitted] if the buyer, disponee, or pawnee, has not notice by the document or otherwise, that such person is not the actual and *bond fide* owner of the goods." The reader would imagine, from Lord Tenterden's abridgment (which is adopted in the sixth edition, that of Mr. Serjeant Shee, 1840), that the enactment was meant to give validity to any *bond fide* deposit, or pledge of goods by any person possessing those *indicia* of property enumerated at the commencement of the section. He will therefore be not a little surprised at finding that in *Taylor v. Kymer*, 3 B. & Adol. 337, it was held by Lord Tenterden himself, in delivering the judgment of the Court of King's Bench, that a person with whom goods had been pledged as a *security for India warrants*, which he had entrusted to the factor who pledged them with him, was held *not* to be protected by them!—See now, however, stat. 5 & 6 Vict. c. 39, by which this branch of law has been most beneficially altered.

the necessity of *uniform vigilance and circumspection*, in order that he may early acquire the habit of reading, and thinking, with calmness and deliberation. "This study being built upon the perfection of reason, requires a constant and serious meditation; and what we apprehend *altius quotidiana meditatione figendum est*, that being fastened in our minds, and the reason thereof fully considered, *habitus fiat, quod est impetus*—that bringing it within the verge of his own reason, he may, upon the least summons, find the result thereof." *

SECTION VI.

IMPORTANCE OF RETAINING THE NAMES OF LEADING CASES.†

A READY recollection of the names of cases is a great object with the practical lawyer. What is meant by this is, not the recollection of the *name*, only, of an important case, and the volume of the Reports where it is to be found, but of the substance of the decision; so that one may be able, at a moment's notice, aptly to cite it in court, or elsewhere. The name of the case and the number of the volume will suffice—as the *page* can of course be easily found without burthening the memory with it. Suppose the question under consideration is one concerning the distinction between a *penalty*, or *liquidated damages*—the experienced lawyer instantly thinks of *Kemble v. Farren*, 6 Bingham—a recent decision, in which all the older ones are discussed, and on the margin of which, perhaps, he

* *Stu. Leg. Ra.* pp. 53-4.

† *Vide ante*, p. 773.

discovers his own MS. notes of several approximating and later cases. He thus gets at once to the heart of his subject—*le siège des difficultés*—and speedily and satisfactorily disposes of it.

Readiness in thus recollecting and quoting cases, is not a less *showy* than valuable accomplishment—and is, therefore, sometimes attempted by those who are quite unequal to the task. They can sport, perhaps, the name of the case, and the right volume of the Report; but either wholly forget, or recollect indistinctly, or misunderstand, and consequently misrepresent, the point of the decision. An instance of this, equally painful and ludicrous, was given in a previous page.* “And here,” says Mr. Raithby, “it must be obvious, that the exercise just now recommended, will be particularly necessary to the legal student, who, in the course of his future practice, cannot but have frequent occasions for the use of his memory in the statement of some case or opinion, recollected at the moment, by which his argument may be supported, or his positions enforced, with a peculiar brilliancy of effect and illustration. No after-labour can supply adequately the want of this particular power of memory. A man may fill the back of his brief with extracts, quotations, and cases, and yet omit one which would be more serviceable than all the rest: could he but recollect this at the very moment, it would serve him in a most essential manner—but it is entirely forgotten, or remembered so imperfectly, that the recital of it, should it be attempted, would most probably do his argument mischief, rather than good.” An early and persevering attempt to form this habit will soon repay the young lawyer, by its prodigiously abridging labour and

* *Ante*, p. 829.

preventing loss of time in subsequent researches. Fifty or sixty leading cases, thoroughly understood and distinctly recollected, will be found of incalculable value in practice—serving as so many sure landmarks placed upon the trackless wilds of law:—and why should not the number be doubled, or even trebled? What pains can be too great, to secure such a result?

SECTION VII.

HOW TO ACQUIRE THE ART OF EFFECTIVELY STATING, *VIVA VOCE*, FACTS AND ARGUMENTS.

ACQUIRE this habit, good student, if you have it not—anxiously cultivate it if you have,—or save the stamps and other expenses of a call to the Bar—or make a present of your wig and gown, if you have precipitately purchased them, to some one who may make a better use of them. How lamentable is it to see a man of talent and learning, unable to acquit himself even creditably in this respect—possibly on the most trivial occasions rising embarrassed—confused—stuttering and stammering, uttering “vain and idle repetitions,” with the agonising accompaniments of “a—a—a,” and sitting down, overwhelmed with vexation and disappointment! However clear may be a man’s conceptions, however consecutive his thoughts, however thorough and extensive his knowledge, he may yet exhibit this sorry spectacle, unless he be either naturally gifted with powers of eloquence, or have struggled early, and successfully, to supply his natural deficiencies. “There is an important distinction,” remarks

Dugald Stewart, "between the intellectual habits of men of speculation, and of action. The latter, who are under a necessity of thinking and deciding on the spur of the occasion, are led to cultivate, as much as possible, a quickness in their mental operations; and sometimes acquire it in so great a degree, that their judgments seem almost intuitive." Bearing in mind, then, this observation, let it be the student's first step towards the attainment of so desirable an object as that now under consideration, to become a practical man—to *accustom himself to the sudden marshalling of his thoughts for action*. Let him often think aloud—often state suddenly the substance of what has been engaging his attention, and under the impression that he is doing it publicly. The more vividly he can imagine himself in such circumstances—can people his room with imaginary auditors—the better, the more vigorous will be his efforts to acquit himself well. Let him imagine his judge severe, his audience learned and critical; this will stimulate him to a rigid adherence to his subject. He will aim at as simple a style of expression—as close and succinct a statement, as possible, of facts and reasonings; turning not for a moment to the right hand or the left, nor encumbering himself with needless details. Let him resolutely reject all surplusage of thought or expression—keeping his object constantly in view, and going direct to it. Nothing but this will protect him hereafter from the painful and disheartening mischance of *suddenly losing, when engaged in public, the connection of his thoughts*—or will, at all events, put him in the way of quickly recovering it. The student must learn not only to think, but to *express* himself, consecutively. He must not for a moment forget the object with which he set out, or

cause his hearers to forget it, by wandering into irrelevant matter, or undue amplification. Let him, therefore, in such solitary exertions as those now recommended, throw himself entirely into his case—be as much in earnest as though he were actually engaged in public debate—suffering no incident—no sudden suggestion—no momentary interruption, to put him off his guard. Having thus, as it were, broken the ice, let him next practise similarly before some judicious friend, who will try him with a few interruptions—press him with questions—check his redundancies, and recal him from digressions. This will be found an invaluable expedient. His next step may be to enter one of the legal debating societies. Every institution may be abused—and undoubtedly those in question are often so; but they will be found admirably adapted to further the interests of those who resort to them with befitting motives and objects, and in a proper manner. Those of them with which the author has been acquainted (of which the principal one is still flourishing,—THE FORENSIC, which meets in Lyon's Inn Hall, every Wednesday, and has numbered amongst its attendants most of the eminent members of the Bar, from the late gifted and lamented Sir William Follett, downwards) have been really miniature sittings in Banco, and excellently calculated to discipline a legal speaker. A legal question is fixed for discussion on a given evening, of which due notice is given; two *affirmantes*, and two *negantes*, are appointed beforehand, who open the discussion—and then any other member of the society may follow who pleases; it being the business of the first speaker to reply generally, and of the president to sum up the arguments of all who have spoken. Many of the distinguished members of

the present Bar have, to the author's knowledge, been indebted for much of their success to the instruction derived from these interesting and instructive associations. Of Lord Mansfield, it is said by Mr. Butler, "that while he was a student in the Temple, he and some other students had regular meetings to discuss legal questions; that they prepared their arguments with great care; and that he afterwards found many of them useful to him not only at the bar, but upon the bench."* It may have been not a little owing to the early attention bestowed by Lord Mansfield upon these matters, that he acquired the art which has been so well described by Mr. Butler, in a subsequent portion of his Sketch:—

"He excelled in the *statement of a case*. One of the first orators of the present age said of it, that 'it was of itself worth the *argument* of any other man.' He divested it of all unnecessary circumstances; brought together every circumstance of importance: and these he placed in so striking a point of view, and connected them by obser-

* Hor. Subsec. pp. 201, 2.—"There are many reasons," says Roger North, "that demonstrate the use of society in the study of the law—1st. Regulating mistakes; oftentimes a man shall read and go away with a sense clean contrary to the book, and he shall be as confident as if he were in the right: this his companion shall observe, and sending him to the book rectify his mistake. 2d. Confirming what he has read; for that which was confused in the memory, by rehearsing will clear up and become distinct, and so more thoroughly understood and remembered. 3d. Aptness to speak; for a man may be possessed of a book-case, and think he has it *ad unguem* throughout, and yet when he offer at it shall find himself at a loss, and his words will not be right and be proper, or perhaps too many, and his expression confused; when he has once talked his case over, and his company have tossed it a little to and fro, then he shall utter it more readily and with fewer words, and much more force. Lastly, the example of others, and learning from them many things which would not have been otherwise known. In fine, the advantages of a fit society are, to a student, superior to all others put together."—*Disc. on the Study of the Law*, pp. 30, 31.

ventions so powerful, but which appeared to arise so naturally from the facts themselves, that frequently the hearer was convinced before the argument was opened. When he came to the *argument* he showed equal ability—but it was a mode of argument almost peculiar to himself. His statement of the case predisposed the hearers to fall into the very train of thought he wished them to take when they should come to consider the argument. Through this he accompanied them, leading them insensibly to every observation favourable to the conclusion he wished them to draw, and diverting every objection to it, but all the while keeping himself concealed; so that the hearers thought they formed their opinions in consequence of the powers and workings of their own minds, when, in fact, it was the effect of the most subtle argumentation and the most refined dialectic.”*

We cannot conclude this section better than in the words of those ancient worthies, Coke, Fulbeck, and Phillips.

“The next thing to be observed,” quoth Coke, “by our student, is *conference* about those things that he reads and writes. Reading without hearing is dark and irksome; hearing without reading is slippery and uncertain; neither of them yield seasonable fruit without conference.”—“Students,” saith Mr. Fulbeck, “will not do amiss, if at certain times they meet amongst themselves, and do propose such things as they have heard or read, by that means to be assured of the opinion of others in those matters. By this means they may be brought better to understand those things—one, perhaps, seeing and giving a reason which the other is not aware of; and, if he misapprehend a point of law, the other may instruct him

* Hor. Subsec. pp. 207-8.

therein. Hereby are they likewise brought more firmly to retain in memory the things that they have heard or read."

"Often conference, and private debating of points of law, is of great advantage; for thereby are the wit, the memory, and the tongue, very much furthered and holpen, and a man is made more ready and bold for public matters; and the truth, which is the work of study, doth more easily appear. And when the mind by long reading is fraught with many thoughts, the wit and the understanding do clarify and breake up in the communicating and discoursing with another,—he tosseth his thoughts more easily, and marshal-leth them more orderly,—he seeth how they look when they are turned into words. Finally, he waxeth wiser than himself, and getteth more by an hour's discourse than a day's reading.—It was well said by Themistocles to the King of Persia, that speech was like cloth of arras, opened and put abroad, whereby the imagery doth appear in figures; whereas in thoughts they be but as in a pack.—Nay, of such exceeding advantage is it, that a man (saith Lord Bacon) had better relate himself to a statue or picture, than to suffer his thoughts to pass in smother; for he learneth of himself, and bringeth his own thoughts to light, and whetteth his wit as against a stone, which itself cuts not."*

* *Stu. Leg. Ra.* pp. 182—4.

SECTION VIII.

THE REPORTS—READING OF, AND EXERCISES UPON THEM.

WHETHER a *continuous* perusal of the Reports should be attempted at all—and if so, whether the pupil should commence with the old ones, or read from the *latest* up to the old ones—is a question which need not long occupy our attention. There is such a mass of intricate and obsolete law in all the old reporters, including even Coke, Plowden, and Saunders, as renders it eminently unadvisable for the student to attempt a continuous perusal of them. It would be calculated only to bewilder, mislead, and distract him from those practical studies to which chamber tuition will incessantly call his attention. There is, besides, something proverbially repulsive in the form and structure of our early reports; which, to say nothing of their dreary black letter, Norman French, and Dog-Latin, are stuffed with all manner of obscure and ridiculous pedantries, scholastic as well as legal, involving the simplest points in endless circumlocutions and useless subtleties.* “The ancient reporters,” says Chancellor Kent, “are going very fast, not only out of use, but out of date, and almost out of recollection—yet cannot be entirely neglected. The modern Reports—and the latest of the modern,—are the most useful, because they contain the last, and, it is to be

* The exquisite burlesque on our old Reports, entitled “*Stradling v. Styles*,” and which is found in Swift’s Works, is given, for its truth and humour, in the Appendix (No. XII.). It is often erroneously attributed to Swift, and to Dr. Arbuthnot: but it seems to have been really the joint composition of Pope and Mr. Fortescue (afterwards, in 1736, made a Baron of the Exchequer), and who was, says Sir Walter Scott, “*though (!) a lawyer, a man of great humour, talents, and integrity*” /—*Swift’s Works* (by Scott), vol. xiii. p. 138.

presumed, most correct exposition of the law, and the most judicious application of abstract and eternal principles of right, to the requirements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age."* Perhaps, therefore, the student, if desirous of a systematic study of the reports, cannot do better than adopt the suggestions of Mr. Raithby, and read from the latest reporters upwards.

"In reading the reports," he observes, "I cannot help thinking you will find it most convenient to begin with the latest, referring, as you read, to the earlier cases, as they are cited and commented upon in the *judgments* of that which you are reading; always making a note of reference from the earlier to the later cases.

"The first thing to attend to, in this branch of your reading, is, a comprehension of the **FACTS** of the case; and I think it may be stated, as a general rule, that any report which does not present a clear and succinct statement of the facts out of which the point for decision arises, may be passed over; in the next place, read attentively the judgments of the court; and, lastly, such parts of the arguments of counsel, as are commented upon by the court, and no other, except in a few instances, perhaps, for the sake of elucidation; for you will soon find your reading so voluminous as to demand the greatest attention, not less to the expense of time, than of money.

"You will never consider your reading of any particular case complete, until you shall have also read and understood, and noted in the proper place, not only that particular case,

* 1 Kent, Comm. 478, where will be found an interesting and judicious account of our Reporters, ancient and modern: the dividing line being with propriety placed in the year 1688.

but the statutes and cases referred to by the court in the judgment; and I should think you would find it useful if, after having made yourself thoroughly acquainted with the facts of any given case, and before you proceeded to the judgment, you were now and then to compose an argument, either extemporaneous or written, and compare it with the arguments advanced by the counsel, but particularly with the judgment of the court. By this method you will have a chance of acquiring legal views, and a course of legal reasoning, which you will find in many instances to be essentially different from the common notions of mankind, and for want of which many men of superior understanding have failed at the bar.”*

Every case in the current number of the reports must, of course, be read over with care proportioned to its importance;† and it would be highly advantageous if the student were to associate with himself, in this task, some steady intelligent friend. Their mutual suggestions would be both interesting and instructive. It is of the utmost importance that he should thus become accurately acquainted with the new decisions, which often effect very serious alterations, and of which it might be most dangerous to remain ignorant. This observation is at present of particular consequence, occupied as the courts have been during the last ten or twelve years with the construction of the new statutes and rules, which have remodelled the law of practice, pleading, and evidence. If the student be pressed for time, let him content himself with reading over the statement of facts, the

* Letters, pp. 442, 443.

† See Sir Edward Coke's quaint and inflated eulogy of the dignity and value of Reports, in the Preface to his 9th Report.

questions arising out of it, and the leading judgment ; but he must not *lightly* omit perusing the arguments of counsel. He must also cast a careful eye over the short abstract of the *pleadings*, which is often prefixed to the report ; and, if he find in them anything worthy of remembrance, let him *make a note of it for future use*. He will often, by these means, find most timely and valuable assistance, by way of precedent, in his own practice. One hint more may be offered on this part of the subject—that the student should guard against an implicit reliance upon the *marginal abstracts* of the reporters. Learned and experienced though they many of them be, it is not to be expected that in the difficult task of extracting the essence of a long and intricate case, often with very little time at their disposal, they should escape sometimes even very serious errors. The student would find it an admirable exercise to endeavour to frame *his own* marginal extract of a case, and then compare it with that of the reporter. A little practice of this kind would soon enable him to detect the points of a case, to seize upon its true bearings ; and this, as we have already seen, is one of the most distinguishing characteristics of what may be termed a legal, or judicial mind.—The student should, however, not only thus *read* the reports, but should frame *exercises* upon them. Let him take a particular case, either in the older or more recent reports, and copy out the statement of facts with which it commences ; carefully abstaining from reading the marginal abstract, the arguments of counsel, or the judgments. Let him consider this as a case prepared originally for his own examination, and do his best. Let him rely upon it that his case is well stated—not a word wanting or thrown away, not

a fact redundant or deficient—that, in short, there is everything necessary to conduct him to a correct conclusion. If he cannot master it—if he feel himself at sea—that he cannot, after due diligence, discover the authorities, let him, as it were, *take the corks*; that is, let him copy from the bottom of the page the references to the cases cited by counsel *pro* and *con*. Having consulted and carefully considered these, let him read the arguments of the counsel, to see how *they* used the authorities which he has been examining. He must then close the book, and, after due consideration, write his opinion upon the whole case. He may then turn to the report, and read the opinions of the judges, where he will observe *their* business-like way of dealing with that by which *he* has been sorely puzzled and bewildered! By these means, our student makes himself the pupil of the judges themselves; the best of their labours, and those of experienced and skilful counsel, are his; he is early accustomed to the best modes of legal investigation; he has ever before his eyes the models of legal reasoning. Thus he will see exactly where and how far he strayed—his mischoice and misuse of the authorities. Thus will he be first driven to his own resources; then he may gradually enlighten himself by the hints and arguments of counsel; and, finally, be corrected or corroborated by judicial wisdom. Surely this is a course worth pursuing! Is it not worth a little labour? Is it not calculated to rouse his attention, and keep up his interest? If he will but give this scheme a fair trial, he will not regret having listened to the suggestion.

The increasing voluminousness and expensiveness of the Reports are a source of constant and vehement complaint. The author is not, however, among those who murmur

at the complete and elaborate character of the modern Reports; considering of what importance it is, that those cases which are to be our guides for future emergencies should be as perfect and as *ample* as possible. Who is not delighted at discovering in the Reports a full statement of the pleadings and evidence of a case which thereby affords him a clew to find his way out of the perplexities of the one he is considering;—which is so decisive, both in point of *reasoning* and decision, as to satisfy the most captious and bigoted? How much litigation might have been spared, had the *grounds* of particular decisions been more distinctly stated!—It is true that there is a fearful disparity in point of size between Croke, Strange, Douglas, or Cowper, and Barnewell and Alderson, Cresswell, Adolphus, Ellis, Bingham, and their contemporaries—between Peere Williams and Vesey, jun.; but it should, at the same time, be remembered, that the transactions which now lead to litigation, especially those of a commercial kind, are themselves of a very complicated, novel, and difficult character, and scarcely susceptible of the compression of former times. It should also be borne in mind that the Reports of the present day are published, not as heretofore, often after a long interval, during which important particulars were forgotten,—but almost immediately after each term, while the reporter's recollection of facts and arguments is fresh and distinct; and while the law, moreover, is in an extremely unsettled state. The unhappy competition at present existing between the reporters, is doubtless also a reason why each inserts more than he otherwise would, for fear of being accused of meagreness and imperfection.—No one, however, can read our current Reports without acknowledging the learning

and accuracy with which the majority of them are prepared. Were they more numerous even than they are, a good *Digest* would always enable one readily to find what one wanted; and if we tremble for our successors, on contemplating the prodigious accumulations of a few years—say twenty or thirty—with which they may be overwhelmed, we may be relieved by the assurance that a whole series of Reports, if of inconvenient bulk, may,—having assisted in establishing the law on such a sure and solid basis as will exclude the necessity for such copious Reports as are requisite while a new system is in process of rapid development,—be easily and advantageously abridged, perhaps by authority, and so brought within a reasonable compass.

SECTION IX.

CONDUCT IN CHAMBERS.

MUCH of the student's early career will be influenced by his conduct in chambers—by the habits and character there formed and acquired. It is, therefore, of importance that he should conduct himself there with discretion.

If he select a pleader who has one or two other pupils, he should by all means encourage the discussion of legal questions with them—an invaluable auxiliary, if it be not pushed to excess so as to interfere with private study, or attention to business, and do not engender a noisy, captious, disputatious humour, which is, of all things, to be shunned. If the student be fortunate in his companions—that is, if they prove steady and industrious—he will derive the utmost benefit from their co-operation.

Let him attend carefully to the business which may be, in due time, and when he shall have become moderately prepared for it, put into his hands; and on no pretence suffer himself to fall into habits of haste and inattention. Whatever is put into his hands, let him set about instantly and heartily. He must not obstinately attempt to master it without assistance, by poring over it till his patience is exhausted, his mind confused, and himself disheartened. After reasonable effort of his own, let him go at once to his pleader, and ask for assistance. Let him not, however, go to the other extreme, and run to ask questions at every little difficulty which he may encounter, without having given himself time to *think* on it. What is he to do hereafter, in the emergencies of actual business—what will become of his faculties, if every opportunity of exercising them is to be thus *shirked*? The student must never lose sight of the necessity of cultivating a spirit of *self-reliance*. In a year or two he will be called upon to transact business upon his own account—his own unaided responsibility—when he will have no tutor to run to, but will be in the presence of his eager and anxious client—or the critical and watchful Bench and Bar. Let him keep this consideration ever in view; let him imagine himself engaged upon his own account, remembering that the clients whom he may hereafter obtain, will, in a very short time, commit themselves—their characters and properties, and those of *their* clients—to his management. Considerations of this kind will prove a salutary stimulus to exertion. Sweet, too, is the contemplation of that difficulty which has been fairly mastered by a man's own efforts!—Whether, therefore, it be a “case” or a pleading, that puzzles him, let the

student work it well ; look at the facts in every way ; call in aid PRINCIPLES :—then turn to his digests ; cast about in his mind : and if, after all, compelled to call in the assistance of his pleader, let him *put his questions well to him*. Before he goes, let him arrange, in his own mind, what is the precise difficulty he wishes solved ; and let that be put briefly and succinctly. Let it be framed in as abstract terms as possible. Let not the tutor be teased with a tiresome bungling recital of circumstances—or even forced, possibly, to read over the whole case, in order to ascertain for his pupil the particular difficulty—except, of course, in cases where that consists wholly in the very combination of the circumstances themselves. The case, for instance, may be of this kind. A tenant, being in arrear with a quarter's rent, applied to his landlord for time to pay it : and, after a good deal of negotiation, in the course of which another quarter elapsed, the landlord agreed to take a promissory note for all the rent due, and it was accordingly given. Not being paid when due, the landlord distrained, and the tenant is now anxious to know whether his landlord had a right to distrain for the rent in respect of which he had taken the promissory note, instead of pursuing his remedy on the security which he had agreed to take.—Possibly the pleader has to hear the whole case—mixed up with much irrelevant matter—stated, or, at most, an imperfect epitome, which makes it necessary for him to cast his eye over the statement. How much better, now, would it be to answer the question, “ Well, what's the matter now ? ” with something which would show that a little reflection had been exercised, as—“ Pray, can a landlord distrain for rent in respect of which he has taken a bill or note, if it be dis-

honoured?"*—*Et de sic similibus*. Few things indicate more readily and decisively than this, the knowledge and capacities of pupils. When a question has been thus distinctly put, let the student take care to understand distinctly the *answer*. Do not run off "like a hasty servant, that goes away posting without his errand"—with only half an answer, or none at all—but understand precisely the solution which has been given of the difficulty. Rather than go away without it, put the pleader—if not at the time engaged with business—to the trouble of repeating it even more than once. It is advisable, also, for the pupil to copy into a note-book the more important opinions given by his tutor, prefixing to them a brief summary of the facts of the case—and to make a point of frequently reading them over, and referring to the authorities cited. Merely copying them out, and never again referring to them, is an utter waste of time.—The same observation applies to *pleadings*.

Let us earnestly impress one practical hint upon the young pupil in a pleader's chambers: to avoid the folly into which many fall, of ambitiously addressing themselves principally, or exclusively, to the more difficult and 'special' kind of business in chambers. Let him for a long time seize with avidity the apparently humbler, but infinitely more valuable class of papers, which constitute the ordinary run of business; and acquire a thorough knowledge of the structure of the common counts—particularly in Debt and Assumpsit—and the pleas of most usual occurrences, particularly noting the *facts* to which they are applicable,

* He can. The mere receipt of such an instrument does not suspend the right of distraining. *Davis v. Gyde*, 2 Ad. & Ell. 623, Note. This case (p. 627) is, by the way, an instance of the late Mr. Justice Littledale's apt citation of Comyn's Digest, as mentioned in a former case.

and which constitute nine-tenths of the ordinary transactions of life occasioning litigation. One of the most consummate pleaders now at the Bar, assured the author, that he adopted this plan when a pupil at chambers with an eminent pleader. "I used to draw" says he, "all the little common things, and left the long troublesome special ones to my companions: yet when their drafts, &c. had been settled, I used to read them carefully over. All my knowledge of law I owe to having spent my first year in this way!" Too often does a student sit, as it were, watching for a high case of interest or importance to rise above the surface of ordinary routine; while the great under-current of business is gliding away unregarded through the fixed and settled channels of these same despised common forms: and thus the prudent pupil may *possibly* be able to do that pretty well, which he may not be called on to do above a dozen times in his life—and be perplexed and confounded by that which may constitute his daily business!

The student must not encourage his acquaintance to call upon him during business hours. They are then little else than pestilent gadflies; tempters, who prevent a goodly day's work, by exciting and distracting his mind, and holding out the bait of visiting, or sight-seeing. No pleader or barrister, moreover, will thank a pupil for filling his rooms with idlers and hangers-on.—*Verbum sapienti*.

In short, let the student attend at the place of business, for the purpose of business: bearing in mind the advice given by Chief Justice Wilmot to his son:

"To whatever figure in the dial of business the finger points, you must invariably keep your eye upon it; all your studies, and applications, and habits, must lead towards it."

SECTION X.

GOING DOWN TO COURT.

THE student must not think of going down frequently to the courts, till he is in at least the second or third year of his pupilage; for, every day devoted to this purpose, is lost to all others.* His object in going thither will be, of course, to watch the ultimate working of the principles and practice which he is learning in chambers, so that he may see the practical commencement, prosecution, and termination of legal proceedings, and be thus the better able to apprehend the real scope and tendency of chamber practice. It is quitting the *process*, to look at the *result*; and by this means will be obtained a distinct and complete view of the connection between the parts, and the whole, of the legal system. As soon, therefore, as the student shall have gained

* "Now I observe two errors," says Roger North, "in the direction of students to this matter,—1st, that they go to the courts too soon; 2d, that they attend at the wrong place. It is certain that more law is to be gathered by reading than at court, and if it were not for practice, it were better not to come there, but to take the cases resolved, that are fit to be known, from report of others, and employ the morning, which is the prime of their time, in their chamber, reading and common-placing. Now it is usual, after a year or two's residence in the inns of court, for all students to crowd for places in the King's Bench Court, when they are raw and scarce capable of observing anything materially, for that requires some competent knowledge; and the bad consequence is, that it makes them pert and forward, and apt to press to the bar when they are not half students; and that is the downfall of more young lawyers than all other errors and neglects whatever. For this reason, I would not have any lose time from their studies after this manner, till after four or five years' study, and two years afore they come to the bar, which should not be before seven of study, is more than enough, especially when, to get a place, they must be very early and idle about, or worse, till the court sits, and then with little more profit than such may expect, who come only to hear news."—*Disc. on the Study of the Law*, pp. 33, 34.

a pretty extensive insight into the method of transacting chamber-business, the working of pleading, evidence, and practice, let him go down to court, on suitable occasions, either to a trial at *Nisi Prius*, or an argument in banc, and watch the proceedings with the profoundest attention of which he is capable. "As to attendance in the courts of justice," observes Professor Woodeson, "though the student's time may there be most usefully employed,—for a little practical experience often countervails much reading,—yet his time *may* be there also miserably wasted. An imperfect understanding of the cases there argued, will not only be unattended with improvement, but productive of pernicious errors. On this ground the practice of the learned Plowden is highly deserving of imitation; who, as he relates by way of useful admonition, acquainted himself beforehand with the subject-matters which were to be argued in the courts, and studied the points of law, so that, he says, "I was so ripe in them, that I could have argued them myself." [Rep. Pref. p. vi.]* It would be well, therefore, if the student, in accordance with this suggestion, were to make a point of acquainting himself thoroughly beforehand with any case in his pleader's or barrister's chambers, which he intends to hear tried or argued, and then let nothing distract him from attending to it in court. Thus he will behold the drift and object of many a rule which he had never before distinctly comprehended, however frequently it had come under his notice; he will see the consequences of erroneous pleading, and the fitness of good pleading to develop the real merits of a case. It will, so to speak, stir about and freshen the whole mass of

* Woodes. Lectures, vol. iii. p. 541; and see Raithby, Letter xlviii. p. 444 (2d ed.).

his learning, open to him entirely new views of the legal system, and inspire him with a keener interest in all that appertains to his profession.

In order, however, to do all this advantageously, the student must go in an attentive humour, and preserve it throughout. He must endeavour to "keep himself to himself"—not to recognise a single acquaintance, if he can help it, unless that acquaintance be one concerned in the case, or engaged, like himself, in watching it. If he go only to nod to this person, chatter with the other, and scribble notes to a third, he will but disturb the court, distract himself, and cause it to be suspected, that, being too idle to stop at his studies in chambers, he is come to court in order to make others as idle as himself.

He will find no difficulty in getting a good situation for seeing and hearing all that goes on ; and should not fail to make notes of whatever strikes him as new or difficult. Let him, then, as he walks home—and he should always prefer walking home from court *alone*—strive to recapitulate what he has heard : an admirable exercise for his memory : —and at his first vacant moment in the evening, let him strive to draw up a brief and succinct account of the arguments referring to the chief authorities cited, and especially perusing those portions of the books of Practice which prescribe the form of the proceedings he has been witnessing, and the exposition, in Phillips, or Starkie, of the rules of evidence which he has just seen exemplified.

SECTION XI.

COMMON-PLACING.

— Who reads

Incessantly, and to his reading brings not
A spirit and judgment equal or superior,
(And what he brings, what need he elsewhere seek)
Uncertain and unsettled still remains ;
Deep versed in books, and shallow in himself,
Crude or intoxicate, collecting toys
And trifles for choice matters, worth a sponge ;
As children gathering pebbles on a shore.

MILTON—*Par. Regained.*

THE merits and demerits of the system of *common-placing* have occasioned much contrariety of opinion.*

"The science of law itself," says Sir William Jones, "is, indeed, so complex, that, without writing, which is the chain of the memory, it is impossible to remember a thousandth part of what we read or hear. Since it is my wish, therefore, to become, in time, as great a lawyer as Sulpicius, I shall, probably, leave as many volumes of works (180) as he is said to have written."

"Common-placing," says Fulbeck, "is a profitable course,—under titles to digest the cases of the lawe, into which they may transfer such things as they have either heard or read ; neither is it safe to trust to other men's abridgments, which are little available to such as have read a little : but that which we, by our owne sweat and labour do gaine, we do firmly retain, and in it we do principally delight ; and I am persuaded that there hath never been any learned in the law and judicial, who hath not made a collection of his own, though he hath not neglected the abridgments of others."†

* See Stewart's Phil., ch. vi. § 5, pp. 446—454.

† Directions Preparative to the Study of the Law, p. 44.

"It is so necessary," says Roger North, "that without a wonderful—I might say miraculous—felicity of memory, three parts of reading in four shall be utterly lost to one who useth it not."*

"*Whatever* a student shall find in the course of his reading," says Sir Matthew Hale, "he should abstract and enter the substance of it (and more especially of cases and points resolved) into his common-place book, under their proper titles: and if one case fall aptly under several titles, and it can be conveniently broken, let him enter each part under its proper title: if it cannot be well broken, let him enter the abstract of the entire case, under the title most proper for it, and make references from the other titles unto it. It is true, the student will waste much paper this way, and possibly in two or three years will see many errors and impertinences in what he hath formerly done, and much irregularity and disorder in the disposing of his matter under improper heads. But he will have these infallible advantages attending this course:—1st. In process of time he will be more perfect and dextrous in this business. 2nd. Those first imperfect and disordered essays will, by frequent returns upon them, be intelligible at least to himself, and refresh his memory. 3rdly. He will, by this means, keep together under apt titles whatsoever he hath read. 4thly. By often returning upon every title, as occasion of search or new insertions require, he will strangely revive and imprint in his memory what he hath formerly read. 5thly. He will be able, at one view, to see the substance of whatsoever he hath read concerning any one subject, without turning to every book (only when he hath particular occasion of advice or argument, then it will be necessary to look upon that book at

* Disc. on the Study of the Law, p. 24 ; and see pp. 25, 29.

large which he finds useful to his purpose). 6thly. He will be able upon any occasion suddenly to find anything he hath read without recouring to tables or other repertories, which are oftentimes short, and give a lame account of the subject sought for."*

The above authorities in favour of an extended and systematic mode of common-placing, are selected out of very many which could be cited; and it may be safely stated, that many of the most distinguished lawyers have held similar opinions. They are cited—and the last, especially—at length, in order that the student may be apprised of their existence, and of the weight due to their sanction. Nevertheless the author humbly ventures to suggest, that, in his opinion,—not hastily formed, nor without inquiry of eminent and successful lawyers,—this system of incessant transcription is one of very questionable expediency. He knows one individual who, with prodigious industry, had compiled four thick folio volumes, very closely written, and most systematically distributed; and who subsequently acknowledged to the author that it had proved to be one of the very worst things he had ever done; for his memory sensibly languished for want of food and exercise, till it lost its tone, almost irrecoverably. However urgent the occasion, he could do nothing when out of the reach of his common-place book—and that could not be *kept up* for practical purposes, without the most oppressive labour. He subsequently quitted the profession, and often bitterly regretted the time and pains which had been thus thrown away.

When pursued to such an extent as this, the student never reads to remember, but only with a view to *insertion in his common-place book*: he is satisfied as soon as what he

* Preface to Rolle's Abridg. p. 8; and see Wynne's Eunom. lxvi. lxvii.

reads is deposited *there*—and thus, at length, suffers the *hand* to engross the business of the *head*. “Many readers I have found unalterably persuaded,” says Dr. Johnson, “that nothing is certainly remembered but what is transcribed; and they have, therefore, passed weeks and months in transferring large quotations to a common-place book. Yet why any part of a book, which can be consulted at pleasure, should be copied, I was never able to discover. The hand has no closer correspondence with memory than the eye. The act of writing itself distracts the thoughts; and what is twice read is commonly better remembered than what is transcribed.”* “Common-placing,” says the illustrious Gibbon, “is a practice which I do not strenuously recommend. The action of the pen will, doubtless, imprint an idea on the mind, as well as on the paper; but I much question whether the benefits of this laborious method are adequate to the waste of them; and I must agree with Dr. Johnson, ‘that what is twice read is commonly better remembered than what is transcribed.’”† The author knows several instances of gentlemen who have now attained great professional eminence, who never kept a common-place book, nor made more than a few occasional memoranda of striking passages, in their lives; and who attribute the present tenacity of their memory, in a great measure, to their *avoidance* of common-placing. It is by no means the author’s wish, however, to express an unqualified disapprobation of this system; it is against the *abuse* of it that he would guard his younger readers; against the fatal facility with which they may fall into habits destructive, not to the memory only, but all the other powers of the mind. If a common-place book is to be kept, let it be kept judiciously, and be appro-

* Idler, No. 74.

† Gibb. Misc. Works, 97 (ed. 1814).

priated to the reception of those passages only, met with in the course of reading, which are either rare, or very striking in point of argument, or expression. Does the student happen to stumble upon a few sentences which in an instant clear up difficulties that have haunted him for months—it may be years—*they* are worthy of an entry in his common-place book—or at least of a reference; and, if they be altogether passed by, he may not be able to meet with them again, however great may be his emergency. How many choice passages in the judgments of a Hardwicke, a Mansfield, a Kenyon, an Ellenborough, an Eldon, or a Tenterden, and other distinguished judges, have charmed him for a moment, and then been lost, for want of being entered, or referred to, in his common-place book! The late Sir Samuel Romilly has left on record his testimony in favour of the prudent mode of common-placing here recommended. “As I read, I formed a common-place book, which has been of great use to me even to the present day. It is, indeed, the *only way* in which law reports can be read with much advantage.”

The principal use of a common-place book is, to minute down the result of any investigation of more than ordinary difficulty or importance—in which authorities will be brought together which are nowhere else collected, and which will save the labour of research on some future occasion. In it should also be deposited select passages—even mere sentences—containing felicitous illustrations of important points, striking distinctions, &c. &c., to be found either in the arguments of counsel, the decisions and dicta of the judges, or observations of legal writers. A common-place book, in short, should be kept upon the principle of inserting in it nothing but what is important, and cannot be easily, if at all, found elsewhere when

wanted. The moment this principle is lost sight of, a common-place book becomes not only a delusive and pernicious substitute for the exercise of memory, but an unwieldy, embarrassing, and oppressive encumbrance.

SECTION XII.

COPYING PRECEDENTS.

By "copying precedents" is meant, transcribing various forms of pleadings from the collections of a tutor and others,—adding to them, from time to time, the most important of those which occur in actual business, in order that they may thus not only afford assistance in future emergencies, but, in the effort of transcription, familiarise the student with the technicalities of drafting. This, also, is a system which has at once very zealous friends and opponents. Hear the opinion of a practical man :—

"The legal student has at present," says Mr. Lee, the author of the ' Dictionary of Practice,' "so much to learn, that it may seem a waste of the period allotted to him for the purpose of necessary practical acquirement, to employ that period in copying matter into a precedent-book, which publications of the highest authority present already much more perfectly to his hand. Sir Edward Coke, even in his time, does not seem to have thought it essential to a student's advancement in the knowledge of the law, that he should copy precedents. The precept of that great lawyer, which is to be found towards the conclusion of the immense body of entries collected and published by him, is—'*Evolve ista exemplaria.*' It will be observed that the expression is not '*exscribe,*' or any other synonyme of that

signification. My own conviction is, that every hour employed in copying precedents elsewhere existing in print, is an hour *lost*—but which might have been usefully spent in acquiring the principles on which those precedents were originally framed; but, *to copy*, is the course in a pleader's office—and hence, as I conceive, a radical defect in the system of that part of legal education; a gross and mechanical system, strangely grown out of imputed interest on the one hand, and a total want of any more rational acknowledged system, to which the observation of the student may be directed, on the other.”*

These censures are levelled, it will be observed—and some twenty years ago—at the practice of transcribing precedents “already existing in print”—one, however, which the author cannot believe to be prevalent at the present day. They are, at the same time, equally applicable to the custom which did, till a very few years ago, prevail, of copying, by wholesale, *manuscript* precedents—a shocking waste of time and industry. Some students would sit down to this task with all the energy of infatuation, making everything else give way to it: nothing seemed to them so desirable, so advantageous, so creditable, as to be able to exhibit, at the end of their pupilage, four or five closely-copied quarto volumes of these “Precedents”—precedents which were copied out mechanically, and the structure and properties of which were, therefore, nearly altogether overlooked! The author has reason to believe that the strong condemnation of this practice, contained in the former edition of this work, has not a little aided in exploding this absurd and mischievous practice. Nothing can be more desirable than for the student to copy out a few *good* precedents, judiciously selected

* Lee's Dict. of Practice. See also Ritzo's Introd. pp. 27, 29.

—with due reflection upon what he is doing, and constant reference to the rules and principles on which they are framed.* Three or four precedents a week, *thus* copied, will be of great service to the student; not only as tending to fix in his mind the rules of law, but to assist him hereafter, in the construction of pleadings, in the course of business. He cannot go to a greater extent in copying precedents than this, without uselessly encroaching on his valuable time, and degrading himself into a kind of copying clerk. But he “wants these precedents for future practice.” Then let him, with his tutor’s permission, hire a copying clerk to copy them for him—asking his tutor to point out those which are peculiarly worthy of transcription. Why should he not aim at the formation of declarations and pleas himself, rather than be thus forever relying upon the wits of *others*—a mere drudge, and “gatherer of other men’s stuff?”

SECTION XIII.

CIVIL AND INTERNATIONAL LAW.

THE author has, in previous portions of this work, repeatedly impressed upon the student, the necessity of acquainting himself with the doctrines of the civil law, as the source whence have been derived the best portions of all systems of modern jurisprudence, particularly our own. In the present section he will lay before the student the opinions upon this subject of several persons of great eminence and authority.

“Inasmuch,” says Chief Justice Holt,† “as the laws of all

* See Mr. Preston’s remarks on this subject, in the Preface to his *Conveyancing*.

† *Lane v. Cotton*, 12 Mod. 482. And see Wynne’s *Eunomus*, *sub voce*.

nations are doubtless raised out of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law ; therefore, in many things, grounded upon the same reason." Such are the sentiments of that great English lawyer ; and they are sufficient to turn the student's attention to the august system of which they are spoken, provided he be desirous of acquiring a comprehensive and profound knowledge of the science of his profession. It would be easy to point out numerous instances, in the Reports, of the extent to which the principles of the Roman jurisprudence are recognised in the common law of England. But we must now content ourselves with referring to a preceding page,* where will be found a very recent and interesting instance.

"Sir Matthew Hale," says Burnett "set himself to the study of the Roman Law ; and though he liked the way of judicature in England, by juries, much better than that of the civil law, where so much was entrusted to the judge, yet he often said that the true grounds and reasons of law were so well delivered in the *Digest*, that a man could never understand law as a science, so well as by seeking it there : and therefore he lamented that it was little studied in England."†

"I have not the smallest scruple to assert," says a very learned writer, Dr. Hallifax ‡ "that the student who confines himself to the institutions of his own country, without joining to them any acquaintance with those of imperial Rome, will never arrive at any considerable skill in the GROUNDS and THEORY of his profession ; though he may, perhaps, attain to a certain practical and mechanical

* *Ante*, p. 412, 413.

† *Life of Hale*, p. 24.

‡ *Analysis of the Civil Law*, Pref. 22.

readiness in the forms and practice of the law, he will not be able to comprehend that enlarged and general idea of it, by which it is connected with the great system of universal jurisprudence, by the knowledge of which alone he will be qualified to become a master in this art, and be capable of applying it, as an honourable means of subsistence to himself, and credit to his country." The celebrated Leibnitz has pronounced a very striking panegyric upon the civil law, declaring that "he knew nothing that approached so near the method and precision of geometry."*

"It is admirably calculated," says Lord Mansfield, "to furnish the minds of youth with universal and leading notions relating to natural and positive, to written and unwritten law; it instructs them in the various rights of persons, whether in a natural or civil capacity; the origin and rights of property; the grounds and reasons of testamentary and legal succession; the obligations arising from proper and improper contracts; the several species of civil injuries and crimes, together with the means of applying for and obtaining redress, and of bringing the guilty to condign punishment. It will be to entertain a very mean and disparaging opinion of the venerable monuments of ancient wisdom, contained in the body of the Roman law, to regard the rules there laid down for the decision of controverted points, whether of a public or private nature, as the maxims of mere lawyers. These great masters of legislature were as eminent for their skill in moral as in legal knowledge; and the sublimest notions, both in philosophy and religion, are inculcated in their writings. Accordingly we find them frequently called, among their other titles, '*Juris divini et humani periti*;' and the very definition of jurisprudence given by Ulpian (Dig. I., 10),

* Opera, tom. iv. p. 254.

like that of '*sapientia*,' by Cicero (De Off. I., c. 43), is—'*Divinarum atque humanarum rerum notitia*.' This affinity between the study of the law and of philosophy, has impressed a remarkably scientific cast upon the responses of the Roman sages; and a competent knowledge of their tenets and principles is absolutely necessary in order to understand with exactness and taste, the allusions to Roman customs and manners, which abound in the Latin classic authors; to which must be added—what will still more recommend the science to the polite scholar—the purity of the language in which the Pandects, in particular, are composed,—which are held to be so perfect and elegant in point of style, that the Latin tongue might be retrieved from them were all other Latin authors lost."

We shall conclude with the following judicious and accurate estimate of the Civil Law, contained in the Commentaries of Chancellor Kent, to whom we have been so frequently indebted during the course of this work.*

"The value of the civil law is not to be found in questions which relate to the connection between the *government* and the *people*, or in provisions for personal security in *criminal* cases. In everything which concerns civil and political

* Vol. i. p. 547.—Perhaps the most masterly and elaborate account of the Civil Law which is extant is to be found in the forty-fourth chapter of "Gibbon's Decline and Fall of the Roman Empire." Lord Mansfield characterised it as "beautiful and spirited." Chancellor Kent gives also a very able sketch of the civil law in the twenty-third Lecture, which concludes the first volume of his Commentaries, and from which has been taken the foregoing extract. See also the late Mr. Butler's "Hæc Subsecivæ;" and the elaborate and systematic works of Dr. Hallifax ("Analysis"), and Dr. Taylor's "Elements" of the Civil Law. Dr. Irving's "Introduction to the Study of the Civil Law," recently published (1837), gives ample and interesting details, within a moderate compass (pp. 282, 8vo), of the existing state of the study and practice of the Civil Law, both at home and abroad, and of all the great continental writers upon the subject. This gentleman is also the writer of the article on the Civil Law in the Encyc. Britann. Vol. vi., pp. 708—719. (7th ed.)

liberty, it cannot be compared with the free spirit of the English and American Common Law. But upon subjects relating to *private rights*, and *personal contracts*, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. I prefer the regulations of the Common Law upon the subject of the paternal and conjugal relations; but there are many subjects in which the civil law greatly excels. The rights and duties of *tutors*, and *guardians*, are regulated by wise and just principles. The rights of absolute and usufructuary *property*, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which fairly belong to property, are admirably discussed in the Roman law, and the most refined and equitable distinctions are established and vindicated. *Trusts* are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So the rights and duties flowing from *personal contracts*, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others, the civil law shows the proofs of the highest cultivation and refinement; and no one who peruses it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations."

INTERNATIONAL LAW. The law of Nations is a complex system, composed of various ingredients, but based upon

the fundamental principle, recognised equally by ancient and modern jurists, that a state is to be regarded as a *moral person*—that the moral obligations of individuals and of nations, are identical. The law of nations, in modern times, has received a development unknown to the ancients, owing to the superior civilisation, and constantly increasing intercourse, between nations, especially those of Europe and America; but above all, the benignant influence of the Christian religion. They form, in fact, a vast Christian community, united by religion, manners, morals, humanity, and science—by the mutual advantages of commercial intercourse; the habit of forming alliances and treaties with each other; of interchanging ambassadors; and of studying and recognising the same writers and systems of national law.*—The little work, published by Sir James Mackintosh, entitled “A Discourse on the Study of the Law of Nature and Nations,” is an elegant and much admired performance, and will afford the student a favourable introduction to this important and interesting subject. By far the ablest Treatise on International Law, in its modern form, is that contained in the first nine Lectures with which Chancellor Kent opens his admirable “Commentaries”—to which we unhesitatingly refer the student. It is written in a spirit of enlightened philosophy and candour, and communicates correct and comprehensive views of the subject, in an elegant and scholarly style.—VATTEL’s “Law of Nations” is also a work of acknowledged authority; and was edited by the late Mr. Chitty, and published, in 1834, with copious and often valuable notes. Grotius and Puffendorff are authorities too well known to require more than a mere allusion to them.

* See 1 Kent, Com. p. 4.

CHAPTER XIX.

HINTS TO VERY YOUNG COUNSEL.

Condo et compeno que max depromere possim.—Hos. Ep. I. l., 12.

I. THE freedom of speech allowed to counsel, in conducting the cases of their clients, is manifestly indispensable for the administration of justice. It is, however, a weapon which ought never to be wielded but by a GENTLEMAN: who will cautiously keep in view the true reasons for the existence of the right, and be governed, in exercising it, by uniform delicacy and considerateness. It is, however, a matter entirely within his own discretion. If *real* vice, fraud, falsehood, cruelty, meanness, or oppression, are to be denounced, let it be done fearlessly, and with all the power and eloquence which the advocate may be able to command; but still, let him remember the character which he has individually to sustain, and the dignity of that profession of which he has become a member. To indulge in unbridled license of speech, simply because one has the *power* of doing so—under the shelter then, surely, of a most ignominious impunity—is inexpressibly brutal, mean, and cowardly, and proves him who is guilty of it to have no pretensions whatever to the title of gentleman. One should bear in mind the agony which one may be inflicting, in every word that is uttered, upon a

person possibly of spotless integrity, of the highest delicacy of feeling—whose conduct one may have totally misunderstood, of whose real motives one is altogether ignorant—yet is recklessly endeavouring to expose such a person to the ridicule, scorn, and hatred of his friends, and the public—to inflict upon his character injury irreparable. Let not, however, the insolent speaker imagine that he always *succeeds* in doing this: he is far more likely to render the victim of his vituperation an object of sympathy, and earn for himself the character of a hard-mouthed bully: one who is despised by the *gentlemen* who belong to both branches of the profession which he is dishonouring, and by those who sit upon the bench. Listen to the dignified admonition of the Civil Law.

*“Ante omnia, universi advocati, ita præbeant patrocinia jurgantibus, ut non ultra quam litium poscit utilitas, in licentiam conviciandi et maledicendi temeritatem prorumpant: agant quod causa desiderat: temperent se ab injuriâ. Nam si quis adeo procaz fuerit, ut non ratione, sed probriis putet esse certandum, opinionis suæ imminutionem patietur: nec enim conniventia commodanda est, ut quisquam, negotio derelicto, in adversarii sui contumeliam aut palam pergat, aut subdole.”** The young counsel should not take it implicitly for granted, that all adverse witnesses are coming to swear falsely, or that the opposite party is really as black as he may be painted in the brief: but should make fair allowance for the bias and excitement under the influence of which his client, however able, experienced, and respectable, so naturally acts. It is his duty to do his very utmost to protect and further the interests entrusted to him: but he may rest assured that

* Cod. Lib. II. tit. vi. § 6.

this he cannot do so effectually, as by a frank and candid, yet circumspect advocacy. Such a course secures the favour of both judge and jury, of opponents, of clients, and of the bar.—The *legal* liability of counsel, for defamatory language used by him in his capacity of advocate, depends upon the principles very clearly laid down in 3 Bla. Com. 29, and in the case of *Hodgson v. Scarlett*, 1 B. & Ald. 232. The defendant in that action was the late Lord Abinger: and it was held, that the true principle was, that the advocate was protected, if what he said was pertinent to the cause, and he did not maliciously avail himself of his situation to utter them. “The advocate,” says Mr. Justice Coleridge, in his note to the passage in Blackstone above referred to, “so far from being entitled to say more than his client would have been allowed to say, under the same circumstances, is laid, by the presumption of his superior knowledge, *under greater restraint.*”

II. When a brief is delivered to the young counsel, he should *immediately* address himself to it; reading it over not hurriedly, but calmly and deliberately, first *thoroughly mastering the pleadings*, with a view to ascertaining distinctly what is to be proved on either side; what is admitted on the record; and whether the proposed evidence be strictly relevant and sufficient. Unless he shall have done this, he will be in a cloud throughout the cause; incapable of rendering any assistance to his leader,—and much less of conducting the cause if that leader should be called away, or absent altogether.—Let him not suppose—again—that a witness can always prove either all that is set down in the proofs, or that what is set down for him is *all* that he can prove, in the hands of a prudent and

skilful examiner. The young counsel should consider how probable it is that the witness knows much more of the circumstances of a case, than he appears by the proofs to know—and how many little, but most important, links in the chain of evidence, can be supplied by him. The examiner should, while eliciting evidence from a witness, bear in mind the various issues which are to be proved or disproved—and, although the *brief* do not suggest it, should put his questions accordingly; and thus get upon the judge's notes a body of evidence of which *he* will readily see the application. Questions should be put very simply and tersely; in good order; without hurrying or confusing the witness,—and with a distinct object and motive for every question.—*Taking down* the evidence, on the brief, is a duty both responsible and difficult. Undeviating attention to the progress of the cause is requisite for this purpose. Nothing immaterial or irrelevant should be taken down—only the substance (but in critical cases the very words) of answers being given. It requires much practice to take a satisfactory business-like note of evidence; and great pains should be early taken to learn the art. The same observations apply, but with still greater force, to the summings up, and to the rulings, of the judge.

It is also often a matter of critical discretion, to determine *upon what counts* the verdict shall be entered. This is not, however, always definitively settled at *Nisi Prius*. Sometimes also it is highly expedient, if not indeed absolutely necessary, to ascertain from the jury their opinion on certain *parts*, of the case which has been submitted to them; and the counsel should be prepared respectfully to request the judge, at the close of his

summing up, to leave such and such a particular fact to the jury, if he should not have done so, and should think proper to act on the suggestion of counsel. Great vigilance also is requisite before acquiescing, at the close of a case—either before or after the delivery of the verdict—in any particular mode of dealing with the case afterwards *in banc*—a matter which, though too often overlooked, in the hurry and excitement of a cause, especially by young and inexperienced counsel, is often of vital importance, as afterwards appears, but *when it is too late*. It is here that the tyro should take special care that he be not, so to speak, jockeyed, by the superior astuteness of an experienced opponent. Whether, for instance, a general verdict should be taken subject to a special case; or whether a special verdict should be taken—whether the court should have power to draw the same inferences from facts as the jury might have done;—whether a nonsuit or verdict should be taken; and if the cause be referred, *on what terms, &c. &c.*—all these and many other things which might be mentioned, require the junior counsel to keep his attention alive to the *very last moment* of a cause—to look from the jury-box to the court *in banc*, and even to a court of error. It not unfrequently happens, moreover, that he is unavoidably left alone, to encounter these exigencies.—Attention to all these matters, every client has a right to require in his junior.

III.—The young counsel should make a point of profiting by every case in which he is associated with eminent counsel, by considering beforehand how he himself would conduct it, if called upon to do so, and then observing how his leader deals with it: how complete, yet guarded in his opening: how much that is suggested

in the brief, he sometimes leaves unsaid—how many facts unproved: how judicious his re-examination or cross-examination: and—often most important of all—how he *replies*. Let him also observe particularly the stage of the proceedings, and the shape in which legal objections are taken—as to the sufficiency of stamps—the production of some written instrument—the admissibility of some evidence tendered, &c. &c. &c.—and, when alone in a cause, be continually on the alert to stop his opponent, when putting leading and otherwise *really* inadmissible questions: we say *really* inadmissible; for nothing is more irritating to both the judge and to opponents, and ridiculous in the presence of the bar, than for a young counsel to be perpetually popping up with puerile and factious objections, overruled the instant they are offered. Again—let him be very cautious how he “follows on the same side,” when his leader has taken some legal objection, either submitting at the close of the case that a nonsuit should be entered, or that the defendant has offered no case to go to the jury—or during the progress of it, by offering some such objections as those above alluded to. He may *paint out* the picture which stood fair and distinct before the court, when he rose: in plain English, he may mar the effect of his leader’s argument, and in doing so, make a most dangerous exposure of his own incompetence. Again—let him not pester his leader with suggestions while addressing the court, or a judge, or the jury, or examining a witness. If he feel *quite certain* that he sees something which one so much more likely than himself to see has nevertheless lost sight of, *then* let him watch his opportunity, and, in a well-considered word or two, con-

vey his meaning distinctly—and in a moment. Generally speaking, the best juniors interrupt least. Never presume to interrupt a judge when he is summing up, except under some very peculiar and pressing exigence; and when that shall have risen, be brief—pointed—respectful—and firm.

IV. Always go well prepared to the consultation. If you do not, you are defrauding your client of his fee. Turn the case over often in your mind, and look at it from every possible point of view—exactly as you would if you were certain of having to lead it. Fortify every doubtful or assailable position—though it may appear not very likely to be challenged—with legal authorities, noted upon your brief; and be sure to give your leader, at consultation, the fullest notice of any real point which may possibly have occurred to you, and been overlooked by him. To keep it by you for the purpose of personal display in court, is merely pitiful roguery or stupidity. —*Always distrust very plain cases*: beware lest a snake suddenly start out upon you, in the shape of some concealed and utterly unexpected difficulty, which would probably have been detected beforehand and disposed of, had due consideration and circumspection been used by those whose bounden duty it was to do so.—Strive, before going into Court, to form a distinct conception of the entire scope and scheme of your case; and when it is going on, keep that scheme steadily before your mind's eye—and watch how it may be varying, as the evidence comes out, from what you had expected it to be. In other words, keep your mind level with the *current of the case*—fixed upon its substance, not its fringe, in order that you may not be lost in details.

V. *Never evade responsibility*—especially in advising in

cases, and with reference to the evidence to be adduced in a coming trial. Do not balk your client, by saying simply "such and such a thing must be *proved*"—but show him *how*, if there be the least possibility of his feeling at a loss. Few things gain a young counsel greater credit with his client, than a full and satisfactory opinion upon evidence. It is easy to write a showy but shallow one. Look, *you*, at your *issues*: imagine yourself at the trial: the case opened: and you there to *prove* it: what is admitted on the record—what remains to be proved. Consider the proper *order* of proof: what documents, or evidence of any kind, are requisite and likely to be in existence, and producible if inquiry be made for them: look to stamps: see that the notices to *produce* and to *admit*, all necessary documents, are duly given: point out particularly what must be done in order to admit secondary evidence: follow out the case in your own mind, into its probable development and minute details at the trial, in order to anticipate and provide against contingencies. Be prepared with witnesses to explain or contradict those who may be reasonably expected to be called by your opponent. Have rather too much, than too little, evidence.

VI. Be uniformly respectful, but never servile, to the court. Be *firm*, if you please—but approach not the confines of flippancy, familiarity, or presumption. A rebuke under such circumstances will be justly galling and humiliating. The ear of the court is gained by modesty, and by speaking briefly and to the point. It is closed against assurance, volubility, prolixity, repetition. How disgusting and intolerable is it to hear a man going doggedly over ground already gone over—

as if the judges had not heard or understood your senior—as if there were no other case to be heard but your own—as if you were not the subject of the “curses, not loud but deep,” of those whom you keep waiting to be heard in their own cases—possibly of far greater importance than that with which you are pestering the court *ad nauseam*! Observe how differently the court listens to a sinner of this sort, and to a man who has earned the character of being brief and lucid! Do not give up too easily; but avoid that accursed pertinacity which you may occasionally see exhibited. Look at the faces of the judges while suffering under the infliction!—Be courteous to your opponents. When you find that you are *being beaten*,—then is the moment to guard against the least manifestation of a ruffled temper—of irritability, or snappishness, or downright ill-humour. It will provoke only laughter, or dislike. 'Tis at this pinching point that you may infallibly distinguish between the temper and breeding of different men—between the man well bred, and him under bred, or ill bred. A gentleman is a gentleman to the end of the chapter.—Never take offence at what is said or done by your opponent, or your leader, unless you deliberately believe that *offence was intended*. If that be the case, you must act as your own sense of self-respect may prompt—with spirit, but prudence. Never permit yourself to speak in a disparaging tone of any of your brethren in the presence of clients. If you cannot praise, be silent. Do not expose a slip, or error; but if possible, and consistent with your duty to your own client, conceal that slip or error, as you would wish your own to be concealed. Avoid buffoonery in conducting a cause. Use no vulgar language, jokes, gestures, or grimace. Play to the critics

in the pit, not to the gods in the gallery. You may possibly make a foolish jurymen or bystander laugh with you, when every one else is laughing *at* you, or is indignant at the degrading exhibition which you are making, possibly before some foreigner, or stranger of critical acuteness and refinement, and who may speak of what he has seen, as a sample of the English bar!

Pay attention to *manner*. Take a few lessons in elocution, if conscious of deficiency. Stand straight up, while addressing either judge or jury, or examining a witness, and do not be sprawling over the desks and benches. Speak with distinctness, emphasis, and due deliberation, if you wish to be heard and attended to. Do everything in your power to acquire self-possession: practise at debating societies, or elsewhere as you may have opportunity. A flustered speaker is always a bad one—giving pain to his auditors, and securing to himself the harassing consciousness, on sitting down, that he has not done justice to either his clients or himself. When you are unexpectedly left alone in a case, keep quiet—be tranquil. Do not proclaim your inexperience or incompetence, by fidgetting yourself and others. To adopt a Scottish phrase, ‘*dinna fash yourself*.’ When a hint is given you by an experienced neighbour, *give your mind* to it, and receive it with courteous gratitude.

Never undervalue your opponent : but give him credit for being able to take advantage of the weak parts in your own case, and be on your guard accordingly.

Do not be disheartened when facts come out adverse to your case, either unexpectedly from your own witnesses, or from those of your opponent. Every fact has two aspects—one favourable to him who adduces it, and

another favourable to *you*, if you have sharpness enough to see it. The moment that it is *established* in evidence, try to reconcile it with your own facts.—Endeavour to secure a command over your features. When the most desperate mischance is befalling you—when *the iron is entering your soul*—look calm, and maintain an air of cheerful confidence. In this the late Lord Abinger and Sir William Follett were perfectly successful.—The jury are watching you, and are often much influenced by such matters.—Never attempt to deceive the judge. When he asks you a critical question, answer cautiously, but not disingenuously. Scorn equivocation—equally the *suppressio veri*, and *suggestio falsi*. Candour and frankness are precious qualities in judicial estimation. Consider how silly and useless is the attempt to play off the petty tricks of practice with men of their thorough experience and knowledge of the profession—its members—and its ways!—*You* may perhaps have too much assurance, or stolidity to perceive it—but every one else may see significant and *dangerous* indications of their profound contempt towards you!

These are a few of the hints which have occurred to the author, during some years' attentive observation, and a little experience. They are offered with diffidence, but not without hope that they may be of some little service to candidates for success at the bar.

CHAPTER XX.

IRELAND—

THE COMMON AND STATUTE LAW IN FORCE THERE.

"I HAVE been informed," says Sir Edward Coke,* "by many of them that have had judicial places in Ireland, and know partly of mine own knowledge, that there is no nation in the Christian world that are greater lovers of justice, than the Irish are; which virtue must, of necessity, be accompanied with many others: and besides, they are descended of the ancient Brittaines, and therefore the more endeared to us."

Such were the terms of hearty and affectionate eulogy in which our great master, Sir Edward Coke, spoke of his Irish fellow-subjects: and in spite of much misery and misunderstanding which have existed between the two countries since his time, we are confident that the hearts of Ireland and of England still beat in unison, and that the best in both countries are most ardent in desiring that we should all live in harmony together, based upon that love and loyalty which are the true foundations of an indissoluble union.

The principles of the Common Law are the same in Ireland and in England, whatever may have been the period at which it was introduced into Ireland; nor is there any essential difference in the mode of administering it.† Almost

* 4 Institute (c. 76), p. 349.

† Note. There are no copyholds in Ireland.

every member of the Irish Bar receives an important part of his education in London ; a circumstance which, added to that of the number of Irish members at the English Bar, contributes not a little to maintain the existing cordiality and affection between the Bars of Dublin and London. There are in Ireland the three Courts of Queen's Bench, Common Pleas, (which is not, as in England, a close court,) and Exchequer, each with four judges, who go circuit twice a year, in spring and summer ;* there are also the Ecclesiastical Courts, Courts of Equity, a Lord Chancellor, and a Master of the Rolls ; those being also, as was lately the case in England, an Equity side of the Exchequer. Both Equity and Common Law are administered on precisely the same principles in London and Dublin : our English Treatises and Reports are their authorities, and our own courts are becoming more accustomed to cite also the Reports of the decisions in the Irish Courts. There exists, however, a little discrepancy and uncertainty between the legislative enactments for the two countries ; and we shall, in our present confined space, content ourselves with indicating very generally the position of the Statute Law of Ireland. It may be distinguished into three periods: *first*, that ending with the year 1494-5: *secondly*, that elapsing between 1494-5 and 1800; and *thirdly*, the period which has since elapsed : distinctions which, at all events to Irish practitioners, it is of much practical importance to bear in mind. (1.) During the first of these periods, English statutes did not bind Ireland, unless where it was specially named, or included by general words. (2.) The second period commences with the year

* There are six Circuits—the Home Circuit, the North-West, North-East, Leinster, Munster, and Connaught.

1494-5; when a set of statutes were enacted in Ireland, in the 10th Henry VII. c. 22, called Poyning's Statutes, (because Sir Edward Poyning was Lord Deputy there) which adopted the legislature of England; by which means all acts passed *previously* to that year, including Magna Charta, became applicable to, and in force in Ireland: but those acts which during the period under consideration have been passed *since* that year, in which Ireland is not particularly named, or generally included, do not extend to Ireland. It is on this account necessary for the Irish practitioner to become familiar with a portion of statute law not brought under his attention in England, viz. that which over-rides the interval between A.D. 1494 and 1800. The student will find many differences in the language of the corresponding statutes of the two countries during that interval, as well as enactments in the one country which are peculiar, and not parallel with similar enactments in the other. Take, as an instance, the case of an action against the sheriff for an escape: in Ireland the venue is *local*, in England *transitory*, because the word Sheriff is inserted in the Irish stat. 10 Car. I. stat. 2. c. 16, but omitted from the corresponding English statute, 21 Jac. I. c. 12, sec. 5. The student whose attention had not been directed to this difference between the two enactments would probably follow the rule on this subject laid down in English books of pleading, and insure thereby defeat to his client,—a result which actually happened in the case of *Collins v. Singleton* (Smith & Batty, 251, *Irish Rep.*). Again, the venue is local in England, in an action of covenant, against the assignee of a lessee: in Ireland it is *transitory*; the Irish stat. 11 Anne, c. 2. sec. 6, making the assignee liable by privity of contract, not of estate; and so it was decided

in *Grogan v. Magan* (Alcock & Napier, 366). So again in Life Insurance, there is a far more important discrepancy between English and Irish law. To prevent gambling, by way of insuring the lives of other parties, stat. 14 Geo. III. c. 48 enacts, that the plaintiff must have an *interest* in the life insured. There being, however, no such enactment for Ireland, any person may there insure the life of any other person.* (*British Insurance Company v. Magee*, (1 Cook & Alc. 182). Other instances might be given; but these sufficiently illustrate the necessity of Irish practitioners having their attention kept alive to this subject.—Gabbett's "Digested Abridgment and Comprehensive View of the Statute Laws of England and Ireland, to the year 1841, inclusive," (in four volumes, 8vo,) and the more recent work of Mr. Oulton, in one volume 8vo, entitled "Index to the Statutes at present in force in or affecting Ireland, from A.D. 1310 to 1835 inclusive," will be found very valuable for this purpose. (3.) The third period commences A.D. 1800, when the union was effected between the two countries by stats. 39 & 40 Geo. III. c. 47 (English), and 40 Geo. III. c. 38 (Irish). Since that event, the general rule is, that statutes bind Ireland, *unless it be exempted from their operation by express proviso*. Now, statutes will be found, the enactments of which manifestly show that the Acts were intended for England only,—and yet they extend to Ireland, for the want of a clause excepting Ireland from their operation. Statutes 57 Geo. III. c. 93; 4 & 5

* It is now, however, very common in Irish insurances, to insert an express condition that the party insuring shall have an interest in the life insured; but why cannot a short Act be passed, extending stat. 14 Geo. III. c. 48, to Ireland?

Will. IV. c. 22 ; and 2 & 3 Vict. c. 29, afford instances of the inadvertent insertion or omission of such proviso, and of the inconveniences and mischiefs consequently ensuing. All this shows the existence of another source of anxiety, another ground for vigilance, on the part of Irish practitioners. It is necessary to add that, by the 8th section of the Act of Union, "all the Laws and Courts of each " kingdom shall remain the same as already established, " subject to such alterations by the united parliament as " circumstances may require ; but that all writs of error " and appeal which might then have been decided in the " House of Lords of either kingdom shall be decided by " the House of Lords of the *united* kingdom."

We may here observe that many statutes have been passed, during the last few years, extending provisions to Ireland, analogous to those which have recently been enacted for this country, but with such variations as the legislature has deemed requisite, on account of the different circumstances of that country. In August, 1841, was passed the statute for regulating municipal corporations in Ireland (stat. 3 & 4 Vict. c. 108, amended by stat. 5 & 6 Vict. cc. 46 & 104). In the same year was passed an act for amending the law for the relief of insolvent debtors (3 & 4 Vict. c. 107, amended by stat. 4 & 5 Vict. c. 47). In 1844 was passed an act (stat. 7 & 8 Vict. c. 90), materially altering the law of bankruptcy in Ireland ; extending to it some of the most beneficial of the recent enactments for England. In 1840 also was passed another most important statute, blending some of the leading provisions of our own statutes for abolishing arrest on mesne process, and for further amending the law, and the better advancement of justice

(see stat. 3 & 4 Vict. c. 105, amended by 4 & 5 Vict. c. 17, and 5 & 6 Vict. c. 95). It extends to Ireland most, if not all, of the excellent enactments of stat. 3 & 4 Will. IV., c. 42, with the exception of that empowering the judges to alter the system of pleading. Till this last change shall have been effected, there is some force in the remark of Mr. Napier—that our new system in England is apt, to a certain extent, to confuse and mislead students preparing for the Irish bar, who learn much of what is not merely unprofitable, but even deceptive, and quite unfitted for Irish practice! With sincere deference to this able member of the profession, we think that he over-states the inconveniences and dangers attending the study of our new system—which doubtless will soon be established in Ireland; when it will instantly sweep away much loose and bad law—much legal rubbish—as it has in England. In an English pleader's chambers, an Irish student will see in full play the rigorously exact system of special pleading, which is calculated to afford him a lively idea of its true genius and spirit, and to enable him to lay the basis of his common-law education, deep in the reasons and principles of that law. His time devoted to pupilage in England is long enough for this purpose, but not to fix in the mind notions which cannot be eradicated on his return to Ireland, and witnessing the operation of the system at present in force there. We have already intimated (*ante*, p. 539) that the new system of conveyancing substituted for fines and recoveries, was extended to Ireland in 1834, by stat. 4 & 5 Will. IV., c. 92. There exist, at present, important discrepancies between the law of landlord and tenant in Ireland and that of England; but the attention of the legislature is at this

moment anxiously directed to the subject; and it is devoutly to be hoped that some of the most severe evils in the system may be safely and speedily eradicated. This subject is, however, surrounded with difficulties, which seem almost insuperable.

For information as to the laws in force in Ireland, generally, the student is referred to Sir Edward Coke's Fourth Institute, c. 76; Hale's History of the Common Law, ch. 9, and Note A. of Mr. Serjeant Runington; Co. Litt. 141 b.; Comyn's Digest, tit. "Ireland," and the same title in Viner's Abridgment, (vol. 14, p. 566, 1st ed.); 1 Bla. Comm. pp. 100, *et seq.* For an outline of the system of real property law in force in Ireland, the student is referred to the Appendix to Burton's Elementary Compendium of the Law of Real Property, pp. 503—519 (1st ed.), and on the subject of Irish appeals to the House of Lords, Mr. Macqueen's "Practice of the House of Lords."

Let us close this brief and imperfect notice, by citing the words used by Sir Edward Coke* in speaking of Ireland,—**"UNION OF LAWS IS THE BEST MEANS FOR THE UNION OF COUNTRIES."**

* Co. Litt. 141 b. Note.—The author has been indebted for several of the suggestions in this chapter to a lecture by Mr. Napier (mentioned in the text), on the Statute Law of Ireland, delivered at the Dublin Law Institute, on the 26th May, 1841, as reported in the "Legal Reporter," vol. i. pp. 243, *et seq.* (Dublin).

CHAPTER XXI.

THE LAW OF SCOTLAND—

ITS DEPARTMENTS, JUDGES, AND PRACTITIONERS.

No English lawyer, of liberal education and comprehensive views of the principles of jurisprudence, can content himself with the knowledge, however accurate, of our own municipal law, merely; but should by all means endeavour to acquire a general knowledge of the principles of *Scottish* jurisprudence. It is based almost exclusively upon the Feudal and Civil Law, regulating, respectively, personal rights, and those of real and personal property. In this latter particular, the Scotch mercantile law has adopted much more directly and extensively than that of England, the doctrines of the Roman Law. Sir Edward Coke observed,* the ‘marvellous conformity in the ancient laws of England and Scotland.’ This resemblance, however, did not exist at the time of the Norman Conquest—at which period the Scottish Institutions were exclusively Celtic,† and those of England, Anglo-Saxon: but it had become established as early as the twelfth century,‡ and not only continued to prevail at the time of the Union

* 4 Instit. 345.

† Hall, Const. Hist. vol. iii. p. 404 (3d ed.); and 1 Steph. Comm. p. 83.

‡ The oldest book of Scottish law is called the *Regiam Majestatem*: which is as clearly a copy of our own Glanvil (*tempore* Hen. II.), as his treatise was servilely copied by Fleta, and was itself little else than a transcript of Justinian's Institutions. See Irving's Civil Law, p. 93.

A. D. 1707, but is even yet, in some particulars, distinctly perceptible. The diversities of practice, however, observes Mr. Serjeant Stephen,* in two large and independent jurisdictions, and the acts of two distinct parliaments, have in process of time naturally tended to introduce great diversities. A co-operative cause of this diversity may be also found in the ancient connection of Scotland with France, where the civil law chiefly prevailed,—and to which the Scottish jurisprudence ultimately became in many respects conformable,† but principally with reference to contracts and commerce. In saying, however, that the civil law is more directly adopted in Scotland than in England, let us not be misunderstood as intimating that the civil law, *quod* civil law, has any more force or efficacy there than here.‡ In the language of Lord Stair, the greatest authority that can be cited, ‘the civil law is not recognised in Scotland as a law binding for its authority, but as a rule is followed for its equity.’§ By the Act of Union, it was expressly stipulated that Scotland should preserve the existing municipal laws, subject to any subsequent legislative alteration. Our common law is of no more force there, than theirs is here. Our courts will not even take judicial notice of the state of the law in Scotland; but, as in the case of a foreign country, if any question happen here to arise concerning it, it is considered as a matter of *fact*, to be ascertained

* Comm. 83.

† Ersk. Inst. Book I. tit. i. § 41; and 1 Steph. Comm. 83, 84.

‡ *Ante*, p. 629, *et seq.*

§ Lord Stair's Instit. Book I. tit. i. § 12. Nor does the Civil Law seem to be, in any proper sense, the law of the land in Holland or Germany, but the source whence have been derived almost all their municipal laws, not plainly of a feudal origin. Irving's Civil Law, p. 122.

like any other matter of fact, by EVIDENCE. See the late case of *Woodham v. Edwardes*, 5 Adol. & Ell. 771.—The *proper* STATUTE law of Scotland commences with those Acts which were passed in the reign of James I. of Scotland; continuing from that period down to the Union with England. Acts of parliament passed since that period, extend to Scotland, though that country be not expressly named. If it be intended to except Scotland from the operation of the Act, such exception must be effected either by an express provision in the Act, or the intention of the Act must be otherwise sufficiently indicated.* Let us proceed, however, to give a sketch of the existing state of law in Scotland, and of the practical administration of it.

It was not till after the middle of the seventeenth century, that the law of Scotland was reduced to a regular system, which was effected by the celebrated "INSTITUTIONS" of Lord Stair: a work surprisingly in advance of the age in which it was produced, and reflecting honour upon the name and family of its gifted author. It is to be regarded, says a distinguished living writer on the Law of Scotland,† as in truth a Digest of the judgments of the Court of Session, reduced to order according to the spirit and arrangement of the Roman jurisprudence. It must not, however, be considered in the light of a *mere* digest of municipal law. It certainly deserves the character given of it by the learned editor‡ of the latest edition—viz., of being a Treatise on General Jurisprudence, illustrated by reference to the Law of Scotland—which appears to have been the noble author's great object.

* See *Rex v. Cowle*, 2 Burr. 853, and 1 Steph. Comm. 87.

† Mr. George Joseph Bell, *Commentaries*, vol. i. Preface.

‡ Mr. John S. More.

‘Perhaps the principles of contracts, or obligations,’ says Mr. More, ‘explained and illustrated with reference to the natural business of life, have never been more ably stated, or more clearly expounded than in Lord Stair’s “Institutions.”’ His numberless references to the law and practice of England, of Rome, and other foreign countries, prove how extensively he had made jurisprudence the object of his study, and furnish a practical illustration of the results of his own observation, that ‘no man can be a knowing lawyer in any nation, who hath not well pondered and digested in his mind, the common law of the world.’ Our own greatest juridical authors make frequent use of the writings of Lord Stair, who is often cited, for instance, by Blackstone.

Nearly a century afterwards appeared another Institute of the Law of Scotland, published posthumously from the Lectures of Mr. Erskine, who had been Professor of Scottish Law in the University of Edinburgh. It has ever since been received as a standard work, characterised by conciseness and perspicuity—and has passed through several editions, the last of which is that of Mr. Ivory, one of the present Scottish judges.

Since the period of the appearance of this second ‘Institute,’ a remarkable change has come over the national jurisprudence of Scotland, owing to the extensiveness of trade, which occasioned a development of the principles of mercantile jurisprudence, and an anxious adaptation of them to the novel exigencies of modern commerce. For a long period, however, the Scottish lawyers adhered too closely to that Roman law, in the learning of which the ancient Scottish lawyers so greatly excelled. A proposal to introduce a law of bankruptcy, similar to that of

England, met with a most determined opposition from the Scottish lawyers. The occurrence of a great mercantile disaster,* however, seemed to allay their hostility, by demonstrating the necessity of introducing the modern maxims and rules already established in England: and in 1772 the Scottish nation were reconciled to the passing of the first Bankrupt Law, which proved 'a salutary remedy, at a very critical moment.†' It is only from this period that the rise of the mercantile law is to be dated. Since then, there has been a gradual, but only a gradual and reluctant, approximation to the commercial jurisprudence of England. It was impossible, however, that constant commercial intercourse should not have the effect of assimilating, at least in the principal points, the jurisprudence of the two countries. The intelligent merchants and lawyers of each, would see the practical excellence and defects of the two, and of necessity adopt the one, and reject the other. An approximation has been made of late years, in the English law respecting debtor and creditor, to that of Scotland, by adopting, to a considerable extent, those principles of *cessio bonorum*, which they regard as an equitable relief from the severity of the law of imprisonment for debt.‡ Whether a complete assimilation between the two systems, is to be expected, we cannot pretend to say; nor shall we offer any opinion as to the expediency of further inroads on the law of imprisonment for debt on final process.—The admirable development of our own system of mercantile law (so often adverted to in previous pages of this work) by Lord Mans-

* The fall of the Douglas Bank.

† 1 Bell's Comment. p. 15.

‡ Dict. and Dig. of the Law of Scotland, p. 136.

field and his eminent successors, has been thoroughly appreciated by the more sagacious lawyers of Scotland; who have, however, continually exercised vigilance and caution to avoid the adoption of those of our English judgments, which 'contained so strong an infusion of English common law,' as to unfit them for entire incorporation into the municipal system of Scotland. Since the happy Union of the two countries in 1707, they have been placed so entirely on the same footing in all the regulations respecting trade, that the system of mercantile jurisprudence may, for all practical purposes, be regarded as the same.* The Bankrupt Act at present in force in Scotland is stat. 54 Geo. III., c. 137 (passed in 1814), which has been repeatedly renewed, in contemplation of a new statute, entirely remodelling the Scottish system of Bankruptcy. Such a statute was expected to be passed in the year 1838; but has not yet made its appearance.

In the year 1816, Mr. Bell undertook the arduous task of preparing his Commentaries† on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence; proposing to himself a free examination of the principles of mercantile law, as illustrated by the decisions and legal authorities of England, as well as of Scotland, with a view to contributing to the improvement of this great system, in both countries; and enabling the lawyers of England to become better acquainted with the Scottish jurisprudence than they had hitherto found to be practicable. This object Mr. Bell has certainly attained. His Commentaries constitute a mine of mercantile law, the

* Bell's Comm. vol. i. p. xiv.

† In two large quarto vols., of which the last edition (the 5th) was published in 1826.

value of which is best appreciated by those who have most frequent occasion to search for analogies, in discussing questions of mercantile law—whether in the capacity of lawyers or legislators—to observe the striking contrasts often afforded by the conflicting provisions of the two systems,—and endeavour to decide between the two, by a careful reference to those first principles, which ought to regulate each. These, then, appear to be the great leading text books of the law of Scotland, and with the contents of which English students and practitioners ought to acquire some degree of familiarity, if with no other view, still with that of being enabled, without the serious disadvantage of utter novelty, to address themselves to the discussion of those important cases which become the subject of appeal from the courts of Scotland to the House of Lords. There has, however, been recently published (1839) the fourth edition of a work by the very learned author of the Commentaries (Mr. Bell), entitled, “Principles of the Law of Scotland,” in one moderate 8vo volume, which is expressly designed for the use of students—to exhibit for them, and for the sudden occasions of practice, a concise and clear statement of the principles and rules of that law. This work comprises the whole extent of Scottish civil law; rights arising from contracts, express and implied, with all their species and incidents; rights of property in land (including a complete outline of the feudal title to land), and moveables (including the mercantile law); the law of marriage and succession; contracts of marriage and family settlements; the doctrine of prescription; the various rights of individuals and of persons in their public relations (including corporation and election law); the law of evidence; the various

species of execution of process; and bankruptcy. In this excellent compendium, frequent reference is made to English law, for the purpose of illustrating its conflict with that of Scotland: and it is a work which may be strongly recommended both to students and practitioners. Another work, of a more practical character, and designed for immediate reference, and also containing brief explanations of analogous provisions of English laws, was published in 1838, entitled, "A Dictionary and Digest of the Law of Scotland," by the late *William Bell* (advocate), in a thick 8vo volume; and which, together with the former one, the author of the present work has been for some time in the habit of frequently using. It is principally questions concerning the alienation of real property, which form the subject of appeals to the House of Lords, and require, in those who are concerned in them, an accurate knowledge of the principles of Scottish real property law, and which, it need hardly be said, are very different from those which obtain in England. What would be thought of any English barrister, though employed as only second or third junior, who proved to know nothing of the doctrines of the Scottish law, or even of its language, and practical details? Would he ever have a second opportunity of exhibiting such ignorance?

With the criminal law of Scotland we need not here long concern ourselves, having given a full account in the Appendix (No. IX.) of the method of criminal procedure in Scotland. The "Principles of the Criminal Law of Scotland" (in one 8vo vol.), of Mr. Alison, the distinguished author of the *History of Europe*,* will present the reader with a clear and intelligible outline of the subject.

* *Ante*, pp. 162, 3.

In the preface to another work, entitled "The Practice of the Criminal Law of Scotland," Mr. Alison states that the criminal institutions of Scotland are founded on the following principles:—

"1. That as the protection of individuals from injury is one of the main objects of civil government, any person against whom a crime has been committed, is entitled to expect that the punishment of his aggressor shall be taken up by the public authorities, and conducted at the public expense.

"2. That, as the prosecution of crimes is a matter of public interest, on the one hand, and, on the other, immediately affects the liberties, and may ultimately endanger the lives, of the accused persons, the privilege of conducting the prosecution may more safely be entrusted to a public and responsible officer, than left to the passions, interest, or resentment of the injured parties, or their legal advisers.

"3. That as the commitment of accused persons for trial is a step of the utmost moment to all concerned, the grounds of commitment should immediately be submitted to responsible persons, qualified to judge of the evidence adduced: and if it do not afford a reasonable prospect of a conviction, the accused should forthwith be set at liberty.

"4. That if the public authorities decline to prosecute at the public expense, an opportunity should still be afforded to the injured party, of himself conducting the prosecution on his own responsibility."

With reference to the administration of the civil law of Scotland, we have already, in a preceding page,* briefly

* *Ante*, p. 710, (a.).

indicated the nature of civil pleading, and the period when civil trial by jury was introduced into Scotland, viz., in the year 1815, by stat. 55 Geo. III., c. 42, which established an institution entitled "*The Jury Court.*" In 1825, by stat. 6 Geo. IV., c. 120, it was found necessary to frame a series of regulations, for the purpose of enabling the new system to work more effectually. Till then, the absence of an apt system of pleading and evidence was felt severely; and great inconvenience was experienced in the progress of a cause, from the introduction of new averments at all stages of the process—and sometimes even at the close of a protracted litigation. To remedy this evil, certain statutory regulations were made, for the purpose of compelling the parties to exhaust their averments, or pleas, before any judgment on the merits of the case should be pronounced. This object has been obtained by a judicial minute, which in the Court of Session is subscribed by the counsel of the parties, and authenticated by the subscription of the Lord Ordinary, whereby the parties mutually agree to hold to certain pleadings, as containing their full and final statement of facts, and pleas in law. The pleadings so adjusted and authenticated, are called the *Record*, and form the basis of the future argument, and the decision of the cause. If the parties cannot agree, or the Lord Ordinary should not think it fit that the earliest stage of the record should be treated as the final and conclusive statement of the facts and pleas, the plaintiff and defendant may be required to put in *Condescendences* and *Answers*, setting forth facts, without arguments, in substantive propositions, and under distinct heads, or articles, setting forth all pertinent facts and circumstances, and accompanying the *Condescendences* and *Answers* with all writings intended

to be relied upon as evidence. These Condescendences and Answers are finally revised and adjusted by counsel, in the presence and with the assistance of the Lord Ordinary, and signed by counsel : the record thus made up, foreclosing the parties in point of fact ; but leave may be given afterwards to introduce new matter arising since the commencement of action (*noviter veniens ad notitiam*). Notes of the grounds of *law* on which the parties intend to rely, are also delivered to the counsel of the parties, with the revised Condescendences and Answers, and future arguments of the parties are to be strictly confined to such points ; but in like manner as new facts may be introduced, so a new plea, or ground in law, may be introduced. The record having been finally completed, is submitted for the decision of the court, or of the jury, according as the dispute turns upon matter of fact, or of law. This experiment proved so far successful, as to justify the incorporation of jury trial with the ordinary jurisdiction of the Court of Session ; which was effected, in 1830, by stat. 11 Geo. IV. & 1 Will. IV., c. 69 : which also effected other important changes in the Scottish judicial system ; transferred the Admiralty jurisdiction to the Court of Session, and restricted the ecclesiastical jurisdiction of the Consistory Court of Edinburgh, and transferred a large portion of it to the courts of the sheriffs : the former being abolished altogether in 1836 (by stat. 6 & 7 Will. IV., c. 41), and the functions of its office transferred to the Sheriff of Edinburgh. In 1838 and 1839 the judicial establishment of Scotland was further remodelled, by several Acts passed in those years, and effecting most important alterations.

Conveyancing is also, as might be supposed, a considerable branch of practice in Scotland. The word " Con-

veyancer," is sometimes there used to distinguish the preparer of deeds from an "Agent," or conductor of law-suits. The forms of Scotch deeds relating to lands, have been, as elsewhere, very much modified by the feudal system : and by a concurrence of circumstances, partly accidental, the feudal forms have, says one of their law-writers,* been in Scotland combined with a system of records, remarkable for both completeness and utility. The titles to landed property, there, have thus attained a very high degree of security. The forms of Scotch deeds concerning *moveable* property, are, says the same author, in general, simple and natural : and the authentication, or testing, of all formal deeds, whether relating to heritable or moveable property, is regulated by statutory enactments, calculated, as far as seems practicable by human ingenuity, to guard against fraud or interpolation. "All our deeds are," continues the writer in question, elsewhere,† "appropriate and simple in their structure and phraseology, and comparatively free from the technicalities and redundancies remarkable in the conveyancing of other countries. The clause of Registration introduced in all formal deeds importing *obligation*, is a valuable expedient, peculiar to the law of Scotland, for giving summary execution, without the expense or delay of a regular action. The deeds of greatest nicety in our practice, and the construction of which has most frequently required the intervention of courts of law, are deeds containing destinations" (i. e. the appointment of the series of heirs to the succession) "of heritable property—particularly contracts of marriage, family settlements, and deeds of entail. But even as to those, the legal rules of interpretation are not complicated, nor, in the ordinary

* William Bell, *Diet. and Dig.*, &c., p. 228.

† *Ib.* p. 270.

case, difficult of application ; although the haste or negligence with which deeds of this kind are sometimes prepared, combined with the difficulties inseparable from every attempt to regulate, prospectively, the various conflicting interests which may emerge in the course of a destination, or which a marriage-contract, or family-settlement, may create, naturally give rise to questions which can be solved only by judicial interposition.”*

We have already, in a former page,† glanced at the nature of the administration of EQUITY in Scotland—viz., that the Court of Session, as the supreme civil court of the country, combines in itself the functions of the English Law and Equity Courts. The doctrine of the Scotch institutional writers is, that the Court of Session is one of equity as well as of law—abating the rigour of the law, and giving aid when no remedy could be had in a court of pure law. This equitable power is, in Scotland, called the *nobile officium* of the court—a term derived from the Roman law—from the *judicium nobile* ; which was the power vested in the prætor, in virtue of which he exercised a kind of legislative control over the law : and in like manner the *nobile officium* of the Court of Session seems, originally, to have encroached considerably on what may be considered as more properly the province of the legislature. Now, however, the equitable jurisdiction of the Court of Session is governed by well-defined principles, and with all the regard usually paid in Scotland to precedent. The examples most commonly given of the exercise of this jurisdiction are those cases in which the court interferes to modify exorbitant penalties in agreements (in analogy to the powers exercised in this country,

* Dict. and Dig. of the Law of Scotland, pp. 272, 3.

† *Ante*, p. 312.

not by courts of equity only, but by courts of law *), or to permit legal or conventional irritances, i. e. *forfeitures* of rights by neglect or contravention, to be purged at the bar, or the like:—or when, in the exercise of its paternal authority, the court interferes in extraordinary circumstances, by interdict or otherwise, for the protection of the property or rights of individuals. Hence Scotch writers have defined equity to be the favourable modification of the law, whether it be that to which the parties limit themselves in their covenants, or the general law of the nation. There is no distinction in Scotland, as in England, between the practitioners of law and equity.

THE SUPREME CRIMINAL COURT OF SCOTLAND, is the *High Court of Justiciary*; which is composed of five of the Lords of Session, added to the Lords Justice-General, and Justice-Clerk; of whom the Lord Justice-General (and in his absence the Lord Justice-Clerk) is president. The jurisdiction of this court extends to all crimes, and indeed the whole of Scotland. It has also the power of revising the sentences of all inferior criminal courts in Scotland; and no appeal can be had from its decision, whether interlocutory or final, to any other court—not even to the House of Lords.

(2). In 1839, by stat. 2 & 3 Vict. c. 36, the legal jurisdiction of the COURT OF EXCHEQUER was transferred to two of the Judges† of the Court of Session, to perform the duties successively and in rotation (§ 4)—the power and duties of the court, with reference to the revenue, having been by a previous act (3 Will. 4, c. 13) transferred to the Commissioners of the Treasury.

* *Ante*, p. 300, *et seq.*

† Not being Lords Commissioners of the Court of Justiciary (§ 4).

(3). The SUPREME CIVIL COURT OF SCOTLAND, is the COURT OF SESSION, instituted A.D. 1532, and formerly consisting of fifteen judges—that number being reduced, in 1830, by stat. 11 Geo. IV. & 1 Will. IV., c. 69, § 20, to thirteen;—viz., the Lord President, the Lord Justice-Clerk, and eleven ordinary Lords. This Court is required, by stat. 48 Geo. III., c. 151, to sit in two divisions:—the Lord President, with three ordinary Lords, form the first Division; and the Lord Justice-Clerk, and three other ordinary Lords, form the second Division. There are five permanent Lords Ordinary—not attached exclusively to either Division, but equally to both—the last appointed of whom officiates in the Bills (*i. e.*, Petitions to the Court of Session) during Session, and performs the other duties of junior Lord Ordinary: the four other Lords performing, in weekly rotation, the duties of Ordinary in the Outer House. The Chambers of the Parliament House, in which the First and Second Divisions of the Court of Session hold their sittings, are called the INNER HOUSE: that in which the Lords Ordinary sit as single judges, to hear motions and causes, is called the OUTER HOUSE,—which is the Great Hall of the Parliament House. The nomination and appointment of the Judges of the Court of Session is in the Crown. No one can be appointed who has not served as an advocate, or principal clerk of session for five years, or a writer to the signet for ten years.

NOTE.—In 1837 was passed stat. 7 Will. IV. & 1 Vict., c. 41, effecting important changes in the law for the recovery of small debts, in the Sheriffs' Courts, and regulating the establishment of Circuit Courts for the same purpose.

Of the Advocates and their professional education, we have

already spoken in an early portion of the work,* and paid no more than a just testimony to their merits. We have had many opportunities of judging of their forensic qualifications, and can bear testimony to the sound learning, the tact, acuteness, and eloquence, displayed by many of those whom we have seen professionally engaged. If we might venture a hint to the junior members of the Scottish bar, it would be, to avail themselves of every opportunity of attending our *Nisi Prius* Courts, and observing the dexterity and despatch with which business is there conducted. Trial by jury is, with us, an old institution; in Scotland it is—at all events in civil causes—in its infancy: and the author has observed, in jury trials in Scotland, that which induces him, with the utmost deference and respect, to offer the advice with which this chapter concludes.

* *Ante*, pp. 49, *et seq.* (supplemental note).

CHAPTER XXII.

ATTORNEYS AND SOLICITORS.

SOCIETY has a very deep stake in the personal character and qualifications of attorneys and solicitors,* a body of men exceeding at this moment, in England and Wales, the number of *ten thousand*; to whom are entrusted the dearest and most important interests upon earth, of persons in every station, from the highest to the lowest—from the peer to the peasant: the property, liberty, character, and even life itself, of every member of the community—and the welfare of those unborn. An attorney and solicitor is perpetually called upon to afford his confidential assistance in cases of the utmost delicacy, difficulty, and often of danger; occasions requiring him to possess a high sense of honour, and incorruptible integrity, as well as discretion, experience, and ready and accurate professional knowledge. The greatest proportion of an eminent attorney and solicitor's employment, is wholly

* There is occasionally exhibited, by junior practitioners, an unaccountable preference for the appellation of 'solicitor' over that of 'attorney'—as if the one implied a higher degree of respectability than the other. "It is a vulgar error," says Mr. Chitty, "that the term *solicitor* is more honourable than, or superior to, that of *attorney*. Lord Tenterden repeatedly animadverted upon the absurdity of using the former term, or name, when applied to any one conducting an *action*, or other proceedings in courts of *law*. There is no distinction in the degree of respectability, any more than there is between *barristers* practising in one court or the other."—2 *Gen. Prac.* p. 2 (c), 2d ed.

cumstances, must be instantly accepted or rejected—measures to be adopted to secure the safety of clients in case of unexpected bankruptcy or insolvency of their customers and connexions. These, and a hundred other cases which might be put, afford daily exercise for the experienced talent and discretion of the attorney and solicitor, not only in London, but in all the other great commercial and manufacturing towns and cities in the kingdom. Consider, again, the case of an attorney called in at a moment's notice, on occasion of a client's sudden and dangerous illness, to prepare a will—on the spot. How disastrous to the family of the deceased will be any oversight, from negligence or ignorance of the professional adviser of the deceased! But it is not a knowledge of *law* only that is requisite, in order to discharge the duties devolving upon a respectable attorney and solicitor. Look at the great and increasing number of *patent* and other cases involving scientific knowledge, in which the preparation of the brief requires much skill and judgment, and no small degree of familiarity with the principles as well as phraseology of science, in order to comprehend and appreciate the instructions of their clients, and lay a well-stated case, either for the preparation of the pleadings, or advising on evidence, before counsel; and draw up a brief for the trial, which shall testify the talent displayed by its framer. There is, indeed, no case, however unimportant in respect of the interests involved, or trivial in its details, the brief in which will not disclose to counsel that its *framer* was a *gentleman* in point of both education and feeling—or the reverse; by one who was professionally skilful, or incompetent. To prepare a brief well, really requires a well-educated man—one who can express himself with conciseness, accuracy, and force,

and arrange his facts and proofs with logical clearness and order ; and the young attorney and solicitor should know, that a well-drawn brief is always appreciated by counsel, and greatly conduces to the success of their advocacy. The moment that the name of " A. B," or " C & D," or " E, F, & G," or " H and Company," is seen at the foot of a brief, it should offer a guarantee to counsel that " all is right," that they may depend upon the case being " got up " well, and *faithfully* as to facts, and worthy of being *thoroughly* read and studied, however long and multifarious in details it may be.

The few foregoing observations suffice to support the assertion with which this chapter commences, viz., that the community at large has a deep stake in securing persons of competent knowledge and respectability, for the discharge of such varied and important duties. Nothing will conduce more directly to such a result, than an early consciousness, on the part of a youth training for the profession, of the grave and arduous responsibilities which await him,—of the immense consequence to himself personally, of preserving from the very beginning a character of unsullied purity, of cultivating the *feelings* of a gentleman ; scorning everything which has the remotest tendency, even, to unconscientiousness, to cupidity, to meanness, or trickery. Let them look at the examples afforded them by the heads of their profession—men of high education and extensive acquirements—universally respected in society, enjoying the friendship and respect of both the bar and the bench.

The establishment of the Incorporated Law Society, in the metropolis, in the year 1832, and which having been from the first powerfully supported, is steadily augmenting

its numbers, has unquestionably exercised a salutary influence over the profession ; and is calculated, now that its operations are combined with that of the recent Attorneys' and Solicitors' Act (Stat. 6 & 7 Vict. c. 73), to confer upon the profession at large and the public, most important advantages. On the establishment of the Society in 1832, it consisted of eight hundred members ; but up to the last year, its numbers were nearly doubled, and include a great number of the most eminent members of the profession. Those by whom the management of the affairs of the society is carried on, are persons of long-established professional eminence ; and since the passing of the Act in question, their duties have become equally important and responsible. The first charter granted to the Society, on the 22nd of December, 1831, was recently surrendered, and a new one obtained, on the 28th of February, 1845, incorporating its members under the name of "*The Society of Attorneys, Solicitors, Proctors, and others (not being barristers), practising in the Courts of Law and Equity of the United Kingdom.*" Important and beneficial changes were effected by this charter, in the form and management of the Society. It is now governed by a President, Vice-President, and Council, which consists of not more than thirty, nor less than twenty members : the entire management of the Society and its affairs being vested in the Council, subject to the control of the General Meeting of the Society, to be held in the month of May. The Society has hitherto conducted its operations with prudence and efficiency, abstaining from interference, where its interference was not likely to be advantageous or successful, but still exhibiting, on proper occasions, a vigilance and energy attended with most beneficial results. The

power which they possess of publicly exposing professional delinquency, and bringing it directly before the Courts, acts as a salutary terror to evil doers ; and doubtless prevents the occurrence of many an occasion for exercising that power. Were it to be rashly exerted, or otherwise than with extreme delicacy and caution, the Institution would soon not only be shorn of all respect and influence, but become an intolerable nuisance.—The Council direct their attention to all Bills in Parliament calculated to affect the administration of justice, or the interests of the legal profession ; with a view to suggesting improvements in them, or if deemed objectionable and mischievous, of calling to them the attention of the government, the profession, and the country. In this way great good has been effected, from time to time, and many of the evils of rash legislation have been either avoided, or mitigated. The New Rules and Orders of all the Courts of Justice, are subjected to the same vigilant scrutiny ; and any practical inconveniences in their operation, promptly and respectfully suggested to the authorities by whom they were framed, with a view to the abandonment or modification of such regulations. Questions concerning professional usage in, for instance, conveyancing transactions, often of a very important kind, are submitted by practitioners to the Council of the Society ; in deciding which, they are guided by the results of long and extensive professional experience ; thereby securing the interests of the *lay* clients, by preventing litigation. The Council keeps also, as we have already intimated, a watchful eye upon all cases of malpractice on the part of attorneys and solicitors in town and country ; and acting in such cases upon the advice of the highest authorities at the bar, oppose the

admission, re-admission, or continuance on the roll, of persons who have been guilty of gross professional misconduct.—A still more important function is exercised by the Society, with reference to the examination into professional fitness and capacity, of all applicants for admission to practise as attorneys and solicitors. This is, in point of fact, an authority delegated to them by the judges, by whom it was formerly exercised, and subsequently recognised by Act of Parliament. The author has had several opportunities of ascertaining that the examination in question is conducted in a thoroughly satisfactory manner; and it has received the decisive approbation of the judges. The examinations are conducted by four members of the Council, over whom one of the Masters of the Courts presides. The following is the course of procedure adopted. On the given day, in each term, candidates for examination repair to the Hall of the Institution, in Chancery Lane, and each, having a number given him, takes his seat at a table on which such number is placed.

A Paper of Questions is then delivered to him, with his name and number upon it, containing questions to be answered in writing, classed under the several heads of,—

1. Preliminary.
2. Common and Statute Law, and Practice of the Courts.
3. Conveyancing.
4. Equity, and Practice of the Courts.
5. Bankruptcy, and Practice of the Courts.
6. Criminal Law, and Proceedings before Justices of the Peace.

Each Candidate is required to answer *all* the preliminary questions (No. 1); and it is expected that he should

answer in *three* or more of the other heads of inquiry,—*Common Law* and *Equity* being two of them.

The answers under the *six above-mentioned heads* must be written on *separate* papers for each head, prefixing to each answer the number of the question ; and each paper is to be written in a plain and legible manner, and *signed*.

The candidates are expected to finish their papers by four o'clock.

When the candidate has finished his answers, he must deliver them, together with his printed copy of the questions, and the ticket given on his entrance, to the secretary, at the Examiners' table ; and he will then receive another ticket, which he is to give to the person at the door when he goes away.

After the Examination has begun, no candidate can leave the Hall (without permission obtained from the Examiners), until he shall have delivered in his answers ; and any candidate who leaves the Hall without permission, will not be allowed to return.

No candidate will be allowed to communicate with, receive assistance from, or copy from the paper of another ; and in case this rule is discovered to be infringed, such person will be considered *not to have passed his examination*.

Between Trinity Term, A. D., 1836, and Michaelmas Term, 1844, inclusive, 3504 candidates had been thus examined, and passed ; and 155 rejected. The author has seen many of the questions proposed on these occasions ; and they have been of a sufficiently searching and practical character. A Digest of all the questions proposed since 1836 has been published by Mr. Maugham, with the sanction of the Council. A new edition, weeded of all the

questions founded on laws since altered, would be very useful to young articted clerks. Lectures are given in the Hall of the Society, by Gentlemen at the Bar, appointed for that purpose, on Conveyancing, Equity, Bankruptcy, and Common Law and Criminal Law. The attendance on these lectures is voluntary; but the average number of attendants is two hundred. By permission of the Council, the articted clerks of members are admitted to the library of the institution, on payment of 1*l.* annually; and the students have a room appropriated to them, free of expense, for the discussion, amongst themselves, of legal questions. Thus, if young attorneys and solicitors are subjected to a strict inquiry into their fitness, they are also provided with superior facilities for acquiring the requisite *degree* of fitness. Let them not, however, imagine that a few months' attendance, however earnest and diligent, on lectures in London, or at an agent's office, will compensate for a clerkship spent in idleness; will save them from the shame and mortification of being rejected; or, in the event of their being just able to struggle through the ordeal, enable them to enter satisfactorily or safely on the discharge of their professional duties, as practitioners!—The importance of the Law Institution, however, and the labours and responsibilities of its officers, have, as already suggested, been recently greatly augmented by the statute (6 & 7 Vict. c. 73); which has also placed the law respecting attorneys and solicitors upon a new and satisfactory footing, not less with respect to them, than to the public. It was passed on the 22nd August, 1843, and was entitled, "An Act for consolidating and amending several of the Laws relating to Attorneys and Solicitors practising in England and Wales."

It relates to no fewer than sixty-eight pre-existing statutes, a great number of which are wholly, or partially repealed, and others re-enacted with various modifications, alterations, and additions. It contains very stringent provisions for the prevention of improper and unqualified persons entering, or practising the profession. It created the new and responsible office of Registrar of Attorneys and Solicitors; and entrusted the performance of its duties to the Incorporated Law Society: a trust securing to it not only a legislative recognition, but a *continuance, during the whole of his professional career*, of that superintendence over every practitioner which, by his examination previous to his admission, had already been reposed in the society, on his *entrance* into the profession. By this appointment a very material benefit was conferred upon the profession—the annual certificates of its members being subjected to a stricter regulation, and the possibility of their being improperly issued, altogether prevented. Among other advantages of the Act, it renders permanent the appointment of Examiners of persons applying to be admitted on the roll. It enables a graduate of one of the Universities of Oxford, Cambridge, Dublin, Durham, or London, to serve one year of his articles with the agent in London. It simplifies the proceedings against attorneys who lend their names to unqualified persons, and against persons assuming to act as attorneys, who are not duly qualified. It removes several technical difficulties in delivering Bills of Costs, and enables an attorney or solicitor to obtain the taxation of his own bill, and secure a judgment without the expense and delay of an action. It makes the Master's certificate final, and prevents a taxation from taking place, after a verdict or writ of inquiry, or after

twelve months from the delivery of a bill, except under special circumstances made out to the satisfaction of the court or a judge, and under any circumstances, after a lapse of twelve months from payment. An attorney's and solicitor's bill may now be referred to taxation for conveyancing, and, in short, whether it does or does not relate to business done in court. By these latter provisions, while the interests of clients have been consulted, attorneys and solicitors have been protected from much of the vexation which the caprice, avarice, and ingratitude of their clients too frequently inflicted upon them. Attorneys admitted in one of the Supreme Common Law Courts, are now entitled to be admitted in any other, on producing their admission, or an official certificate of admission, and that the same is in force, and on signing the roll of the court into which he seeks admittance. Such also is the case with solicitors in the Court of Chancery; and we may here intimate that almost every attorney is also a solicitor. Every attorney may now practise in the Crown side of the Queen's Bench.* In well-regulated offices, especially in the leading agency offices,† great order and system are observed in conducting business in the different departments of Common Law, Equity, and Conveyancing. Sometimes each is made the separate province of one partner; and there are managing clerks appropriated to each department.—No attorney or solicitor can have more than two articled clerks at one time; and no person can be admitted an attorney or solicitor, unless he shall have

* *Ante*, pp. 606, 7.

† By an agency office, is meant that of a London attorney and solicitor, who conducts all that part of the business of country attorneys and solicitors which must be transacted in London.

served a clerkship of five years, or three years, if he be a graduate of the Universities of Oxford, Cambridge, Dublin, Durham, or London: but a material distinction exists between a full service of five years, and one of three years: viz., that in the former case, one of the five years may be spent with a barrister or certificated special pleader (and in both cases, a year with a London agent); while, in the latter case, no time is allowed for attendance on a barrister or special pleader: the period being deemed too limited to admit of any interruption in the acquisition of that technical and practical knowledge which can be acquired only in an attorney's office. The usual premium paid by articulated clerks is £210; but with the more eminent attorneys and solicitors it is from 300 to 500 guineas; added to which is the stamp duty of £120 on the articles, and £25 on the admission, independently of divers other court and office fees. It would, in the author's opinion, greatly conduce to the respectability of the profession, by excluding improper and inferior applicants for admission into it, if every youth intended to be articulated to an attorney and solicitor, were subjected to a preliminary examination into his competency in classical attainments, and the general subjects of a liberal education, as we have seen is the case with applicants for admission into the Inner Temple.* There exists, however, a difference of opinion upon this subject amongst the most experienced members of the other branch of the profession. It has also occurred to the author, that the age at which youths are usually articulated, viz., sixteen, is certainly too early, and that at least two years more should be devoted to the completion

* *Ante*, p. 79.

of their general education—at all events, in the cases of parents whose station and circumstances will easily admit of their adopting such a course. It should be considered how respectable is the sphere in society in which they are destined to move—how important the business they will be called upon to conduct; and that refinement of manners, and a liberal education, are indispensable to qualify for intercourse with the superior order of clients with whom they must be in frequent epistolary communication, and be brought continually into personal contact. A year or two, either with a tutor, or even at one of the Universities—with a little continental travel—would be calculated to sober and invigorate the mind and character, and prepare it for those grave, arduous, and responsible pursuits, to which the attention must so soon be directed. In addition to the usual subjects of a liberal education, it is of essential importance that the future attorney and solicitor should be early familiarised with arithmetic, and its ordinary application to business—*e. g.*, merchants' accounts, book-keeping, &c. &c.; for it is out of these ordinary transactions of life, that the principal business of the legal profession arises, as we explained in a former page,* to which we would refer the reader.—Euclid's Elements will be found of great service in habituating the student to close and correct thinking.

It would, however, be superfluous, after the numerous suggestions and recommendations contained in the foregoing pages of this work, to enter at any length into the subject of either the general or professional education of persons destined to become attorneys and solicitors. To the chapters appropriated to General Education, General

* Pp. 181, *et seq.*

Conduct, Mental Discipline, English History, and to the elaborate but elementary exposition given in subsequent chapters, of the nature of legal principles and practice, we refer the young reader; hoping that, at all events, under the guidance of competent advisers, he may be able to derive useful information from those portions of the foregoing pages. Students, both for the bar, and for the other branch of our profession, are, or ought to be, *gentlemen*; and equally ambitious of excellence, and strenuous in endeavouring to attain it. Each sphere of action is honourable—each lucrative—each calculated to enable its members to acquire the esteem and confidence of each other, and of the public. Different duties are assigned to them; but all are arduous and important,—all require integrity, gentlemanly feeling, industry, talent, and accomplishment. As to which of the two is superior to the other, in social estimation,—in point of rank, and public distinction, and so forth,—let such matters be left for childish dispute and rivalry to those, in either branch of our profession, who understand the duties of neither, and are laughed at by the superior members of both.

If a youth be desirous of passing through the period of his clerkship with pleasure and advantage to himself and his master, let him *begin well*, by bestowing great attention upon all that goes on in the office, however small and apparently unimportant. Let him learn early to go about business quietly, thoroughly, and methodically; doing nothing *without inquiring and reflecting upon the reasons of it*. If he have the good fortune to be articled to a kind and intelligent master, nothing will give the latter so much satisfaction, as to see his clerk manifest such an

inquiring spirit. He will readily refer him to the books of practice, and give him all the *vivâ voce* information that is requisite. If he will go on thus for a few months, he will soon find that he has entered an interesting profession, and be conscious of making a rapid progress in it. He must not be reluctant to do the common *drudgery*, as it is called, of the office. There are some young gentlemen who cannot bear the idea of "tramping" day after day to the courts, public offices, judges' and counsels' chambers, &c. &c., or of copying out and engrossing drafts of bonds, agreements, leases, settlements, &c.; which is exactly the reason why they turn out such dunces, and tremble so violently on passing a certain spacious building in Chancery Lane. More information as to the practical course of business is to be learnt from a day or two spent in serving notices, process, &c., signing judgment, obtaining and opposing the various rules, orders, summonses, &c., making up issues, attending the masters of the Courts of Law or Equity, getting instruments executed and stamped, &c. &c. &c., than is to be obtained in many months, by the most careful perusal of books of practice. Let the young clerk have his wits about him, wherever he is; whatever he may be doing, let him never *hurry*, in however great *haste* he may be; let him not do anything superficially,—in a slovenly inattentive manner. Bad habits of this—indeed of any kind—are easily formed, though not easily got rid of; their tendency is to increase and multiply, and they very soon incapacitate him who has contracted them, for the proper transaction of any kind of business. Then it is, indeed, that an attorney's office becomes odious, and that a relief from its monotony is too frequently sought in dissipation.

The pupil should make constant efforts to acquire early a knowledge of the structure and uses of the *ordinary* instruments upon which he is employed—such as bonds, leases, assignments, mortgages, wills, settlements, &c., making a point of reading, every evening, some practical work upon the subjects which have chiefly occupied his attention during the day. Take a common money bond, for instance: nothing can be shorter and simpler in form than this instrument, and yet much interesting and important information concerning it, may be acquired by an industrious pupil, in a very short time. Has he any idea of the origin of the *penalty* of a bond? Is he aware that it was originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money? * What will be the consequence of a creditor's taking a bond, with reference to other previous securities for the same debt? Will it abridge, or extend, his former rights? What effect will the death or bankruptcy of either party have upon it? What are the general advantages of taking a bond? &c. &c. &c. Information on these and similar questions can always be easily obtained by the pupil; and when obtained, will very much enhance the interest of business, and augment the facility with which he can despatch it. The practice of the Courts should also constantly command a prominent share of his attention. He should endeavour to acquaint himself with the *reason* of the various rules upon which he is perpetually acting, or he may depend upon it that he will never become a really able practitioner.

If it be settled beforehand, whether the young attorney is to practise in town, or in the country, that should be

* 3 Bla. Comm. 434, 5.

a leading consideration in determining to what branch of legal studies his attention should be principally directed. If, for instance, he intend to settle in London, he must early devote himself to learning the practice of the various courts of common law, equity, and bankruptcy, and commercial law. If he intend to practise out of London, he should be guided by the circumstance of his residing in one of the great manufacturing towns, or in the *country*, properly so called. In the former instance, he will direct his chief attention to the law regulating manufactures and commerce—patents, machinery, bills, promissory notes, partnership, agency, insurance, bankruptcy, and insolvency; in the latter, to what may perhaps be termed agricultural law,—that of real property, sales of land, mortgages, copyholds, landlord and tenant, farming leases, distresses, notices to quit, &c. &c., and to sessions and criminal law generally. Here, also, it is of special importance that the practitioner should be well acquainted with the law of wills, executors, &c., called on, as he often is, to frame the former instruments, and advise the latter parties, on the spur of the moment, before he can himself obtain advice or assistance from town, or elsewhere. In fact, one of this latter class of practitioners is thrown more upon his own resources than the other two put together; and it is therefore incumbent upon him to devote his best energies, during his clerkship, to the acquisition of a thorough knowledge of his profession. When he comes to London to spend half a year with his master's agent, or with a conveyancer, he should pay almost undivided attention to real property law.—This is a most important period in the life of the young articled clerk, and very much of his future happiness

and success, will depend upon the manner in which he shall have employed it. Always considering how short is his time, and how much is to be done in it, he must avoid forming a numerous acquaintance, and squandering his money, and wasting his days or nights, in visiting scenes of amusement and dissipation. If he be not wise in time, in this respect, he will assuredly find out his folly, and bitterly regret it hereafter. Let him rest assured that his master's good opinion will always be of great importance, in many more ways, and for a much longer period, than a thoughtless and dissolute clerk may dream of. Is it likely that his master, who often has the opportunity of recommending a young attorney or solicitor for lucrative and confidential situations, will do so, in the case of a clerk whom he knows to have spent his clerkship in idleness or profligacy?

Notwithstanding the number of works on different branches of the law, almost daily making their appearance, it is exceedingly difficult to mention any at once of an elementary character, and sufficiently accurate to put into the hands of very young articulated clerks. Some years ago the writer intended, but was prevented by professional engagements, to have written for this purpose a little work, of a thoroughly elementary character, upon a plan on which he had bestowed much consideration, and which was warmly commended by one or two competent judges of such an undertaking, as calculated to supply an acknowledged *desideratum* in professional literature. The design is not yet abandoned, though indefinitely postponed. At present, he would recommend that a youth, on first entering an office, should content himself, for a month or two, with getting an insight into the routine

of business. Then Smith's Elementary View of the Proceedings in an action at Law, may be put into his hands, followed by Stephen on Pleading, of which only the first part is to be read. Then select portions of Mr. Maugham's General Principles of the Law of England, of Mr. Williams' Principles of the Law of Real Property, and of Mr. Smith's Mercantile Law, and of Selwyn's Nisi Prius, may be read with great advantage by an industrious pupil, under his master's direction. The author also would venture to recommend for perusal, the Chapters in this work devoted to the subjects of Equity, Common Law, Conveyancing, and Criminal Law—in which will be found a plain account of the existing mode of administering these great branches of the law. But his main object should be to master the general run of business in the office—the practical mode of enforcing or resisting rights, in the different courts—the ordinary conveyances and pleadings which are continually passing under his eye—endeavouring at the same time, to refer for the full explanation of them, to the works above-mentioned.—He should also make a point of studying the opinions and drafts of pleaders, conveyancers, and barristers; and, whenever he has an opportunity, should make a copy of them, together with a short abstract of the facts to which they relate. He will soon find himself reaping great benefit from such a practice. When he goes to the courts, either at sessions or the assizes, or the Law and Equity Courts in the metropolis, he should *really attend* to the proceedings, especially in those cases which are being conducted in the office in which he is serving. When he is a little more advanced in his studies, he may consult those chapters in the present work (Chapters XIV., XVI.), in which the leading treatises on the different heads of

law are enumerated, and select those which may appear to him, or his adviser, best suited for his purposes. If it can be conveniently done, he should spend a year with a conveyancer, and also with a pleading barrister—or, at all events, half a year with each; and make the most of the brief and expensive, but precious opportunity. Thus the young attorney and solicitor will lay the foundation of a first-rate professional education, which will enable him readily to take advantage of any opportunity which may offer—and many *do* offer—of displaying his professional qualifications before those who will appreciate them, and give him the substantial rewards due to persevering industry and talent. The author knows of several instances, within the last year or two, of young men of this description being taken into partnership in houses of eminence, solely on account of their well-tryed energy, talents, and assiduity; and of others who have, for the same reasons, shortly after commencing practice, been employed by wealthy clients, who have introduced others, and so led to the speedy formation of an extensive and lucrative practice.

The author had intended to offer in this chapter, for the guidance of junior attorneys and solicitors, a series of practical suggestions which have been the result of his own personal observation and experience: but this work has already so far exceeded the limits originally assigned to it, that he is prevented from doing more than presenting one or two of those suggestions which at present occur to him.

The personal RESPONSIBILITY of attorneys and solicitors, to their clients, is very great; and cannot be got rid of, as young practitioners are too apt to imagine can be done, by

showing merely that they acted, in any particular case, under the advice of counsel. Suppose, for instance, recourse were to have been had to an inexperienced, or incompetent counsel, or to a counsel of competent knowledge and ability, but in a case for which the attorney or solicitor's own presumed knowledge ought to have been sufficient, is the client to be without redress? Assuredly not. *Cæteris paribus*, the circumstance of an attorney or solicitor's having acted upon the advice of experienced counsel, whom he had duly instructed concerning the nature of the case, will go far to exempt him from the imputation of that gross negligence—that *lata culpa*, or *crassa negligentia*—which would not only disentitle him to be paid for his services, but subject him to an action at the suit of his client. An attorney is "bound to use reasonable care and skill in managing the business of his client; if he were liable farther, no man would venture to act in that capacity."* In a recent case (*Godefroy v. Dalton*, 6 Bing. 461), Chief Justice Tindal gave the following sound and cautious exposition (which ought to be learnt off by heart by every articled clerk and young practitioner), of the nature of an attorney's liability for negligence.

"It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish, in the conduct of a cause, is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appear to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on

* Per Le Blanc, J., in *Compton v. Chandless*, cited in (*Baikie v. Chandless*) 3 Camp. 19.

at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court ; for want of care in the preparation of the cause for trial, or of attendance there with his witnesses ; and for the mismanagement of so much of the conduct of a cause, as is usually and ordinarily allotted to his department of the profession ; whilst, on the other hand, he is not answerable for error in judgment, upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law. We lay no stress upon the fact, that the attorney had consulted his counsel as to the sufficiency of the evidence, because we think his liability must depend upon the nature and description of the mistake or want of skill which has been shown ; and he cannot shift from himself such responsibility, by consulting another, where the law would presume him to have the knowledge himself."

What follows from all this, but the absolute necessity which exists for an attorney and solicitor's giving his *personal* and vigilant attention to the business entrusted to him—neither, on the one hand, relying unduly on the advice of counsel, nor, on the other, acting upon his own judgment, when the nature of the case requires, or *warrants*, his obtaining the assistance of counsel? Hence, also, is to be observed the immense advantage of an attorney's himself possessing that degree of knowledge of the principles and practice of his profession, which will enable him to form a sound judgment concerning the propriety of the view of a case taken by counsel, and, if doubtful on the subject, seeking farther advice.—The infrequency, however, of actions against attorneys, for negligence, and the still fewer instances of success in such actions, afford abundant

evidence of the satisfactory manner in which attorneys and solicitors discharge their duties to their clients.

Attorneys and solicitors should be particularly cautious about entering into agreements and undertakings—especially in writing—on behalf of their clients; by which are frequently incurred most harassing liabilities. They are often held to be personally responsible, in such cases, to the opposite party by action,—and may be compelled, by rule of Court and by attachment, to perform such undertakings, even when they are void under the fourth section of the statute of frauds.* The good-natured zeal and eagerness of young practitioners, on behalf of their clients, often induce them to commit themselves in this manner; and expose them sometimes to very cruel and ungrateful conduct on the part of those whom they have obliged.

To very young attorneys, the following few suggestions concerning the practical conduct of business may be of service.

When you have received instructions to commence an action, beware lest, in your praiseworthy desire to save expense to your client, you plunge him into much greater, and peril the success of his cause, by acting upon your own judgment, in choosing the form of action, and framing the Declaration and Particulars. Unless the case be really of the plainest kind, do not undertake the responsibility of preparing the pleadings—nor think seven and sixpence or half a guinea ill spent, in having them prepared by a pleader. When, however, you think it right to draw your declaration and particulars of demand, pay special attention to the framing of the latter, especially with reference to what *credits* you will give to

* In re Hilliard, Q. B., P. C. E. T. 1845.

the defendant. It is often prudent to give him none at all—but leave him to exonerate himself from the *debit*, as best he may. Though such a course may occasion you the costs of a plea of payment, it may secure you several advantages: *e. g.*, the defendant may be forced to call some one to prove it, from whom *you* may obtain valuable evidence, and secure your counsel the reply. Be *very* careful how you rely in your particulars, upon a “balance” of accounts, and beware of pleas of payment, set-off, or of payment of money into Court, in such a case. If you be not on your guard, you may be quietly jockeyed—and not find out your fatal error till consultation—or even till the trial; or, at all events, you may have to amend your particulars, pay the costs of the defendant’s pleas, and be too late to try your cause at the sittings or assizes at which you had intended to try it. Refer to *Eastwick v. Harman*, 6 Mee. & W. 13; *Price v. Rees*, 11 Mee. & W. 576; *Kenningham v. Alison*, 2 D. N. S. 658; and *Lamb v. Mecklethwaite*, 9 Dow, 531. If you resolve to instruct a pleader, do so *before issuing out your writ*; and let your instructions to him, in the first instance, be as full and accurate as if you were preparing rather *your brief* than instructions for drawing the declaration. Get out all the facts from your client in the first instance, and not piece-meal—and only in consequence of the expensive suggestions of your opponent!—Whenever the defendant is an executor or administrator, if he be *your client*, lose not a moment in laying instructions before your pleader, in order that you may not be compelled to ask for time, which you cannot obtain (if your opponent understand his business), except on condition that you will not, in the mean time,

confess a judgment to other creditors, as you might otherwise have done: and if you be concerned for a *plaintiff*, when the defendant is an executor or administrator, and he be obliged to ask for time to plead, be sure that you impose on him the terms of not confessing any judgment in the mean time: this a judge will do, on your application. Anon. 8 Mod., 308; *Hugh v. Pellet*, Barnes, 330; 1 Arch. Pr., 162 (7th edition). It is by no means clear that an attorney, omitting to take such a precaution, would not be held guilty of actionable negligence.

Lose not a moment, especially in cases of difficulty and importance, in laying a declaration or other pleading before your pleader or counsel, within the time limited, in order that, if deemed advisable, (and it frequently *is* very desirable) you may demur specially. This you would be prevented from doing, if forced to obtain time for pleading; which would be granted only on the terms of your pleading issuably. Most important advantages are constantly sacrificed, by inattention to this suggestion. Counsel have the mortification of seeing, not till after time has been obtained, a manifest *technical* flaw in a declaration, which would have secured him the costs of a demurrer, on which he might have also tried the substantial sufficiency of the declaration, where the point was too doubtful to have warranted incurring the risk, or expense, of demurring generally.—Always deliver your briefs, if you can possibly do so, in sufficient time for counsel really to master them. Do not push off everything to the last moment—the consequences of doing so are often fatal to your case. Fix a consultation, too, at a reasonable period before the cause comes on, in order that you may have time to avail yourself of counsels' suggestions

—often of vital importance—to obtain additional evidence, or make some application to a judge for leave to amend, or otherwise. Where you have taken a preliminary opinion upon the merits of your case, generally, especially from experienced pleaders or counsel, insert a copy of it in your brief, with some such heading as—“The following is Mr. ——’s opinion, on the strength of which this action was brought [or defended.]” If your leader be in large practice, and severely pressed for time, a glance at this opinion will often enable him to seize, in a moment, the true points of the case, which otherwise he could not have done.

In drawing up your “proofs,” take pains to insert, under the name of each witness, full details of his expected evidence, with distinct reference to the issues to which such evidence is applicable. Some are as prolix in doing so, as others sparing. Bear in mind that your junior, who may be young and comparatively inexperienced, will probably have to examine the *first* witness. Be therefore careful to let *that* proof, in such a case, be as full and distinct as you know how to make it.

See witnesses yourself; take their evidence deliberately, and read it over to them distinctly, so that counsel may be able, in conducting the case, to rely upon being able to establish their statement to the jury.

The young attorney and solicitor should be very careful in selecting the works, and the latest editions of them, with which he intends to commence practice, and to form the nucleus of his future library. Law books are very expensive, difficult of selection, and continually rendered comparatively useless by important changes in the law, in these days of rapid change—effected since the purchase of

the impaired work. It is conceived that the following, or some of them, are works which may be purchased with advantage, under the guidance of an experienced friend:—

CHITTY'S ARCHBOLD'S PRACTICE, in three thick 12mo vols., including the Forms. *Vide ante*, p. 752. A new edition is (1845) in preparation. This work is indispensable to the practitioner. Archbold's "*Practice of Country Attorneys, and their Agents, in the Courts at Westminster, with Forms,*" is an excellent work, and very useful to country practitioners.

GRANT'S CHANCERY PRACTICE, in two vols. 12mo, is a very useful manual to the equity practitioner; and a new edition of it (the fifth), greatly improved, is on the eve of publication, containing all the late important Orders. Sidney Smith's *Treatise on Chancery Practice*, in 2 vols. 8vo, is also an excellent work; and a new edition of it has just been published.

CHITTY AND HULME'S COLLECTION OF STATUTES OF PRACTICAL UTILITY, in two vols. 8vo. is the best work of the kind extant; and a new edition of it is being prepared by Mr. Welsby.

WOODFALL'S LANDLORD AND TENANT LAW, edited by Mr. Woollaston, in 1 very thick 8vo vol. No practitioner should be without it, especially in the country. The last edition was published in 1848.

WILLIAMS ON EXECUTORS AND ADMINISTRATORS. *Vide ante*, p. 769.

CHITTY ON BILLS (9th ed. 1840), by J. W. Hulme, Esq. in 1 large vol. 8vo.

BYLES ON BILLS. A small duodecimo volume, character-

ised by conciseness and accuracy. The fourth edition was published in 1843. *Ante*, p. 761.

COLLYER ON PARTNERSHIP, 1 vol. 8vo. *Vide ante*, p. 761.

SMITH'S COMPENDIUM OF MERCANTILE LAW, in 1 vol. 8vo (3rd ed. 1843). *Vide ante*, p. 763.

SUGDEN ON VENDORS AND PURCHASERS, in 3 vols. 8vo. The last edition was published in 1839. *Vide ante*, p. 573.

SUGDEN ON POWERS, in 2 vols. A new edition is nearly ready. *Vide ante*, p. 573.

JARMAN ON WILLS, in 2 vols. 8vo. A new edition of this excellent work is in preparation.

COOTE ON MORTGAGES, 1 vol. 8vo. (2nd ed.) Published 1837.

SANDERS ON USES AND TRUSTS, by Messrs. Sanders and WATNER. (5th ed.) 2 vols. 8vo. *Ante*, p. 573.

WILLIAMS' PRINCIPLES OF THE LAWS OF REAL PROPERTY, 1 vol. *Ante*, pp. 560, *et seq.*

CRABBE'S DIGEST and Index, with a Chronological Table of all the Statutes from Magna Charta to the present time; with decisions of all the Courts, on the various sections of them. In 3 large 8vo vols. This work must have cost its author great labour; but the result of it has been a book of permanent utility to practitioners in both branches of the profession, as a ready,—and, as far as we have been able to ascertain, an accurate,—guide, through the wilderness of our statute law.

CRUISE'S DIGEST, by Mr. White, in 7 vols. 8vo. [1835].

DAVIDSON'S PRECEDENTS IN CONVEYANCING, in 5 vols. 8vo. *Vide ante*, p. 574.

BYTHEWOOD AND JARMAN'S PRECEDENTS IN CONVEYANCING, by Mr. Sweet, in 12 vols. 8vo. (nearly completed). The practical notes to this very extensive and valuable collection of precedents are held in high estimation among conveyancers. *Vide ante*, p. 574.

ARCHBOLD'S BANKRUPT LAW, by Flather (10th ed.), [1845], 1 thick vol. 12mo. (with a supplement).

———— **PRACTICE OF THE CROWN OFFICE**, 1 small vol. 12mo. *Ante*, p. 607.

———— **NISI PRIUS**, in 2 vols. 12mo. *Ante*, p. 772.

———— **JUSTICE OF THE PEACE**, in 3 thick vols. 12mo. *Ante*, p. 621.

———— **CRIMINAL PLEADING AND EVIDENCE** (9th edit.), 1 vol. 12mo., by Mr. Jervis, Q. C. *Ante*, p. 620.

BURN'S JUSTICE, by Messrs. Thomas Chitty, and Bere, in 6 thick 8vo. vols. *Ante*, p. 621.

RUSSELL ON CRIMES AND MISDEMEANORS, by Mr. Greaves, in 2 large vols. 8vo. *Ante*, p. 620.

HARRISON'S DIGEST, in 4 thick 8vo. vols. *Ante*, p. 780.

STARKIE ON EVIDENCE, in 3 vols. 8vo., 3d ed. (1842). *Ante*, p. 755.

PHILLIPS ON EVIDENCE, vol. 1. (Published as two volumes). *Ante*, p. 756.

ROSCOE'S EVIDENCE, by Mr. Smirke, (6th ed.).

ROGERS ON ELECTIONS, 1 thick vol. 12mo. (6th ed.) *Ante* p. 770.

ELLIOTT ON ELECTIONS, 1 vol. 12mo. (6th ed.) *Ante*, p. 770.

MACQUEEN'S PRACTICE OF THE HOUSE OF LORDS, 1 vol. 8vo. *Ante*, p. 771.

CHITTY ON CONTRACTS, 1 thick vol. 8vo. (The 4th edition is preparing). *Ante*, p. 758.

CHITTY'S GENERAL PRACTICE, in 3 vols. 8vo. *Ante*, pp. 777, *et seq.*

STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND, in 3 vols. 8vo. (the 4th volume is preparing).

MOODY AND ROBINSON'S NISI PRIUS REPORTS, at present extend to two volumes only, and are worthy of being procured and studied by students in both branches of the profession, on account of the brevity and accuracy with which the decisions are given, and the useful notes subjoined to those cases which are of superior interest and importance.

SMITH'S (J. W.) LEADING CASES, in 2 vols. 8vo. *Ante*, p. 773.

CHAPTER XXIII.

THE INNS OF COURT—METHOD OF ENTERING THEM, KEEPING TERMS, AND BEING CALLED TO THE BAR—POWER OF THE BENCHERS TO REFUSE TO ADMIT INTO THE INNS OF COURT—OR TO CALL TO THE BAR; AND TO SUSPEND AND EXPEL BARRISTERS.

THERE are four Inns* of Court, all ancient and wealthy, exercising the responsible right of admitting persons to practise at the Bar—the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. The sixth Report of the Common Law Commissioners (presented on the 13th March, 1834) contains an interesting account of these important institutions, and several suggested changes in their rules. Their principal recommendations will appear in the notes to the ensuing pages—but eleven years have elapsed, without any of the proposed alterations having been carried into effect. The truth is, that their regulations are so fair and reasonable, and the exercise of authority by the governing bodies has for ages been characterised by such prudence

* The word "Inn" formerly signified the town residence of a nobleman, when he attended Court, (Stow, 125). The most obvious derivation of the words "Inn of Court," seems to have arisen from the circumstance of the seats of learning so designated, having been seminaries for bringing up students for practising in the *courts* of law, which were anciently held, as we have seen (*ante*, p. 439), in the *aula regia*, or Court of the King's palace.—See Mr. Goldsmith's "English Bar, or Guide to the Inns of Court."—p. 4 (n.)

and integrity, and the instances of dissatisfaction with their proceedings have been so exceedingly rare, as to leave little room for beneficial changes of importance. The great practical security which the bar and the public possess, against malversation or mismanagement in the affairs of these societies, is to be found in the characters of the Benchers; who consist of all the most successful and distinguished members of the bar,—of persons whose whole lives have been passed subject to the scrutiny of their brethren and the public, and who can have no interests apart from those of the general body of members of the bar, for whom they are trustees. The number of Benchers in the Inner and Middle Temple, and Lincoln's Inn, averages at present between forty and fifty each: those of Gray's Inn are between fifteen and twenty. There are certain minor discrepancies between their rules and usages, which occasion a little inconvenience and embarrassment to persons seeking to elect between one of the four inns, and render it difficult to give a correct and intelligible account of them. The author has some reason to believe, however, that measures will be ere long taken, and are now, indeed, in contemplation, for the purpose of assimilating to a great extent, the rules and proceedings of all the four inns.—We shall now proceed to give a short account of these matters, based upon the above-mentioned Report, and upon personal inquiry at the offices of the respective inns: the under treasurers and stewards of which are always ready to afford the fullest information to applicants for it. The student is also referred to a useful little work published in 1843, (Spettigue, Chancery Lane) entitled "The English Bar, or Guide to the Inns of Court—by George Goldsmith, of the Middle Temple, Barrister at Law."

I.—AS TO THE ADMISSION OF STUDENTS.*

The following rules appear to have been adopted by all the four societies :—

Before any person can be admitted a member, he must furnish a statement in writing, describing his age, resi-

* The following interesting observations upon the origin of the power of the inns of Court to call to the bar, are contained in the introductory part of the Report :—

"The four inns of court—the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn—severally enjoy the privilege of conferring the rank of barrister at law,—one which constitutes an indispensable qualification for practising in the superior courts.

"No means of obtaining that rank exist, but that of becoming enrolled as a student in one or other of these inns, and afterwards applying to its principal officers (or benchers) for a call to the bar.

"The origin of this privilege of the inns of court appears to be involved in considerable obscurity.

"It was observed by Lord Mansfield, in the case of *The King v. Gray's Inn*, Doug. 354, that the original institution of the inns of court nowhere precisely appears ; but it is certain that they are not corporations, and have no charter from the crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning ; but all their power of admission to the bar, is delegated to them from the judges ; and in every instance the conduct of their societies is subject to the control of the judges as visitors.

"In support of these positions, a variety of passages are cited from Dugdale's *Origines Judiciales*, which clearly show that, in former times, the judges and the benchers made regulations to be observed by the inns of court, not only respecting the admission to the bar, but generally regarding the conduct of the members of the inn, and the admission of students.

"Many instances will be found, in the appendix, of such orders, sometimes made by advice of the privy council and judges, and sometimes by the judges only, and sometimes by the benchers, by advice and direction of the judges, and proceeding from the king's suggestion.

"There does not appear to be an instance, in modern times, in which the judges have interfered with the internal regulations of the different societies, though there are several in which they have acted as visitors, upon appeals to them from the decisions of the benchers respecting calls to the bar.

"In the case of Mr. Wooler, reported as the case of *The King v. The*

dence, and condition in life, and comprising a certificate of his respectability, and fitness to be admitted, which must be signed by the party, and a bencher of the society, or two barristers.* The Middle Temple requires the signatures of two barristers of *that* inn, and of a bencher : but in each of the three other inns, the signatures of barristers of any of the four inns will suffice. No person is admitted without the approbation of a bencher, or of the benchers in council assembled. No person in any trade or business, nor (in the Middle Temple, in any other profession than the law), nor any attorney, solicitor, writer to the signet, or

Benchers of Lincoln's Inn, 4 B. & C. 855, it was held that the judges had no power, as visitors, to interfere with the regulations of the inns of court respecting the admission of students ; and also that the Court of King's Bench could not, in such case, interfere by *mandamus*. It was observed by Mr. Justice Littledale, ' that the Court was called upon to control the society in the admission of their members ; but that, as far as the admission of members is concerned, these are voluntary societies, not submitting to any government. They may in their discretion admit or not, as they please ; and the Court of King's Bench has no power to compel them to admit any individual.' He added, that ' the interference of the judges at the instance of those members of the societies whom the benchers had refused to call to the bar, was perfectly right ; because a member who had been suffered to incur expense with a view to being called to the bar, thereby acquires an inchoate right to be called ; and if the benchers refuse to call him, they ought to assign a reason for so doing ; and if there be no reason, or an insufficient one, then the member who has acquired such an inchoate right is entitled to have that right perfected.' "

See some discussion concerning the nature of the *minor* inns of court, and the power of the Court of Queen's Bench to compel them to admit an attorney, in *The King v. The Principal and Ancients of Barnard's Inn*, 5 Ad. & Ell. 17.

* *Vide ante*, p. 77, where the form of these certificates is given. This rule, the commissioners are of opinion, but we cannot concur in their opinion, " operates with considerable hardship ;" and they suggest in lieu of it, that, as a young man, however respectable, may be unacquainted with any members of the profession, it shall be sufficient for him to produce the certificate of " two graduated members of any of the universities, or of two respectable housekeepers."

solicitor of the Scotch courts, notary public, or parliamentary agent, or acting as such; nor any *clerk* of any such, or of any barrister, conveyancer, special pleader, clerk in chancery, or other officer in any court of law or equity, whether such clerk be articulated, or receive a salary, or any other remuneration for his services, shall be allowed to keep commons for the purpose of being called to the bar, until such attorney or solicitor shall have taken his name off the rolls, and such other person above described, ceased to act or practise in those capacities. In a late case (*in re Bateman*, not yet reported), the Court of Queen's Bench refused to grant a mandamus to the Examiners of the Law Institution, to examine a person who, having been called to the Bar, after having been articulated for three years, completed the remaining two years of his articles, without having been disbarred: the Court expressing a very strong opinion that such a mode of procedure was highly detrimental to the interests of both branches of the profession, and calculated to give most unfair advantages. At Lincoln's Inn, no person can be admitted a student, or called to the bar, who has *ever been* a paid clerk to a barrister, conveyancer, special pleader, or equity draftsman. As soon as a person has been admitted a student, he is allowed free access to the valuable library of the inn to which he belongs, and is also entitled to a seat in the church or chapel of the Inn, paying only some trifling sum annually under the name of "Preacher's dues." He is also entitled to have his name set down for chambers; in which case he receives notice of all such as become vacant, and will be permitted to rent them of the society, subject to the right of members of the bar to do so, or of those who may have made prior application.

The applicant must, before he can enter into commons,* (and, in some of the societies, on admission,) sign a bond with sureties conditioned to pay the dues. Every person applying to be admitted a member of any of the inns, must sign a declaration that he is desirous of being admitted for the purpose of being called to the bar;† and it is required by all the societies that he shall not, without the special permission of the society, take out any certificate as a special pleader, conveyancer, draftsman in equity, &c., under 44 Geo. III. c. 98;‡ and such permission is not granted until the applicant shall have kept twelve terms; and it is given for one year only at a time, the penalty of practising without it, being expulsion. The stamp on every such certificate is twelve pounds, if the party reside

* "We conceive," say the commissioners, "that that part of the present system of all the societies, by which students, in whatever part of the kingdom they may be resident, are required to dine in the common hall a few days in the course of every term, is founded on just views, and attended with beneficial effects. Amongst these may be noticed, that of its making known the person of the student, and exposing him, if his character be disreputable, to more easy detection by the society, before the period of his application to be called to the bar. It also gives an opportunity of attending the courts, and of associating with students and other members of the profession."

† See the form of the Declaration, *ante*, p. 77.

‡ See also stat. 55 Geo. III. c. 184. This regulation is disapproved of by the commissioners:—"With respect to the regulation which relates to practising as *special pleaders* or *conveyancers*, and the necessity for obtaining, for that purpose, the permission of the societies, it appears to us to be objectionable. Its apparent object is to prevent uneducated and incompetent persons from practising in those capacities; but its effect is to make all persons, however well qualified, hold their profession of special pleader or conveyancer, by the precarious tenure of the pleasure of the benchers, and to vest in those gentlemen a discretion very liable to abuse. To subject special pleaders, in particular, to a regulation so arbitrary, is to expose to inconvenience and disadvantage, a body of persons whose prosperity is of great importance to the general interests of the profession, and to the science of the law itself."

in the City of London, or Westminster, or within the limits of the twopenny-post ; if elsewhere, eight pounds.

A student, previous to his keeping any of his terms, must deposit with the Treasurer of the Society 100*l.*, to be returned, without interest, on its depositor being called to the Bar ; or in case of his death, to his personal representatives : but this deposit is not required on the part of persons who shall produce a certificate of having kept two years' terms in any of the Universities of Oxford, Cambridge, and Dublin, or (in the Middle Temple) of Durham and London, an exemption which may soon be adopted by the other Inns ; or of his being a member of the Faculty of Advocates, in Scotland. It has also been a rule at the Inner Temple, since the year 1829, that no person shall be admitted a student without a previous examination (by a barrister appointed by the bench for that purpose) in classical attainments, and the general subjects of a liberal education. Such examination is to include the Greek and Latin languages, or one of them, and such subjects of history and general literature as the examiners may think suited to the age of the applicant. It has, however, been very recently [1845] determined by the Benchers, that this rule shall not extend to persons who have taken the degree of B. A., or passed their examination, at the Universities of Oxford, Cambridge or Dublin.

II.—AS TO THE CALL TO THE BAR.

No person in priest's or deacon's orders can be called to the Bar ; and it may be stated as generally the case, that the persons mentioned in the previous paragraph as ineligible for admission into the Inns of Court, are also ineligible to be called to the Bar. In the Inner Temple,

an attorney must have ceased to be on the rolls, and an articled clerk to be in articles, for three years (in Gray's Inn two years), before he can be called to the Bar. Before a gentleman can be called to the Bar, he must, in all the Inns, be of three years' standing, and have kept commons for twelve terms, by dining in the Hall, at least three times in each term—which days are arranged differently in the different Inns; in some of them provision being made for the convenience of persons in residence at the Universities. In the Middle Temple, a three years' standing, and twelve commons kept, suffice to entitle a gentleman to be called to the Bar, provided—we believe—he be twenty-three years of age. No person can be called to the Bar at any of the Inns before he is twenty-one years of age: and in all the Inns except the Middle Temple, it would seem that a standing of *five* years is required before being called to the Bar, unless the applicant shall have taken the degree of Master of Arts, or Bachelor of Laws, at the Universities of Oxford, Cambridge, or Dublin—or at Lincoln's Inn, or be a member of the Faculty of Advocates in Scotland: in any of which cases, the party may be called to the Bar after having been a member of the Inn of Court for only three years: but this exception does not extend to *honorary* degrees. It is, we believe, under the consideration of the different societies, to concur in some variation of this rule, and to agree upon the same period of standing; and to extend the advantages at present enjoyed by members of the Universities of Oxford, Cambridge, and Dublin, to those of Durham, and London.—The call to the Bar, is by an act of the Benchers, in Council, or Parliament, assembled. The name and description of every

candidate for being called to the Bar, must be hung up in the hall for a fortnight before he is to be called. Any person wishing to be called to the Bar, must make application to a master of the Bench to move that he be so called: and the list of applicants to be called to the Bar, at any of the societies, is always transmitted, before the call takes place, to the other societies.

In Lincoln's Inn, a person wishing to be called to the Bar must read his "exercises" at the bar-table, and the barristers at that table have a power of rejection, subject to an appeal to the Benchers.* If not rejected by the bar-table, it is still necessary that he should be approved by the Bench.

III.—AS TO THE CASE OF REJECTION UPON AN APPLICATION TO BE ADMITTED STUDENT, OR TO BE CALLED TO THE BAR, AND THE BENCHERS' POWER OF PUNISHMENT AND EXPULSION FROM THE BAR.

The general state of practice, in all the societies, appears to be as follows:—If a person be refused admission, as a student, by any of the societies, he has no means, either by appeal to the judges or otherwise, of bringing under revision the propriety of the rejection; and a certi-

* The "reading of exercises" is a mere form, but preserved for the purpose of compelling the personal appearance, before the bar-table, at dinner-time, of the candidate for admission to the bar; in order that the members of it may have repeated opportunities (i. e. nine—three exercises in each term) of seeing him, and judging of his conduct and demeanour, and making inquiries concerning his character and pursuits. This veto of the bar-table is, however, strongly disapproved of by the commissioners. "The candidate is thus made liable to the danger of rejection by either of the two bodies exercising a veto in succession; a strictness for which we see no sufficient reason, and which is not practised by any other of the law societies." They recommend, therefore, that the power of admission or rejection should in future be vested "in the benchers only, to the exclusion of the bar-table."

ficate of the rejection is transmitted to all the other societies.*

Where any of the societies refuse to call a person to the bar, the benchers will hear him personally, or by counsel, and allow him to give evidence to rebut the charges made against him; and, if he be dissatisfied with their decision, he may appeal to the judges. On such appeal, the benchers send to the judges a certificate, stating the reasons on which their refusal was grounded. This was the course adopted in the years 1881-2, in the case of Mr. Daniel Whittle Harvey; who was heard before the bench of the Inner Temple at great length, in explanation of that portion of his conduct as an attorney, which was impugned;—but he was finally rejected. He applied for a public hearing, but the benchers refused; allowing, however, two shorthand-writers to be present—one on the part of the bench, and the other of Mr. Harvey, who afterwards brought the affair before parliament, but ineffectually.

The benchers have also the power of punishing a barrister guilty of misconduct—by either admonishing and rebuking him (of which an instance has recently occurred in the Inner Temple)—by forbidding him from dining in the Hall (as has been done during the present year (1845)

* The commissioners express their disapprobation of the absolute and irresponsible power at present thus possessed by the benchers, and recommend that "either by Act of Parliament or by authority of his Majesty in Council, the society be enjoined to allow, and the judge to receive, an appeal from any act of the benchers of any inn of court, rejecting an application for admission into their society:"—and that where such an application is rejected, whether it relates to admission as a student, or to the call to the bar, the party applying shall have notice in writing of the cause of objection, may defend himself, either personally or by counsel, and produce evidence; and that a full report of the proceedings shall, in case of an appeal, be laid before the judges.

by the benchers of the Middle Temple, who have excluded a barrister from commons for two years),—or even by expelling from the bar (called *disbarring*), of which an instance occurred at Gray's Inn, also during the present year (1845). For the credit and honour of the bar, however, it should be stated that such cases are exceedingly rare. The author believes the above to be the only such instances during a long series of years. In the last case, the party appealed to the fifteen judges, who unanimously confirmed the decision of the benchers.

The mode of applying for admission into any of the Inns of Court, is very simple. The applicant goes to the Treasurer's Office ; states that he intends to become a member ; and all necessary information will be instantly afforded.

The entrance expenses of each Inn average about 35*l.*, the great bulk of which is for stamps (*i. e.*, 25*l.* for admission, and 1*l.* 15*s.** for a bond).

The expenses of a call to the bar are heavy, on account of the stamp, which is 50*l.* The additional charges amount to between 20*l.* and 30*l.*

Every student may, if he choose, dine in the hall every day during term, where he will find very comfortable and substantial dinners.† A bottle of wine is allowed to each mess of four. His commons' bill, if he dine the whole of each term—and he can dine nowhere else, by the way, so cheaply and so well—will be about 10*l.* or 12*l.* annually. He need not, however, incur more expense than 6*l.* a year.

Those who intend to be called to the Irish bar, must keep nine terms in the King's Inns in Dublin, and six or eight terms in one of the Inns of Court in London, accord-

* At Gray's Inn, 1*l.* only.

† The students dine in black gowns, which are provided in the hall.

ing as he may or may not have taken his degree at Trinity College. The sum required on admission to the former, is 45*l*. Terms may be kept in London and Dublin alternately, or otherwise, as the student may find it convenient. If a gentleman who enters any of the Inns of Court as a student for the Irish bar, should subsequently resolve to be called to the bar in England, he may petition the benchers, setting forth the circumstances of the case, who will allow him—provided he be a fit person—the advantage of standing he may have acquired as an Irish student: and if he produce a certificate of having kept two years' terms at any of the privileged universities, he will be allowed the advantage of them; otherwise he must keep twelve terms, after having made a deposit of 100*l*., as required of English students, before he can be called to the English bar.

Gray's Inn is frequently selected by Irish students, on account of the convenience it affords for keeping terms: *i. e.*, students may keep their terms by dining in the Hall, on any three days in the term, which they may please, either consecutively or otherwise. It is also considerably less expensive than the other Inns.*

* There are eight minor inns, or "inns of chancery," which are appendages to the inns of court: Clement's, Clifford's, and Lyon's Inns belong to the INNER TEMPLE; Furnival's and Thavies' Inns to LINCOLN'S INN; New Inn to the MIDDLE TEMPLE; and Barnard's and Staple Inns to GRAY'S INN. These minor inns afford very cheap and convenient residences to students, if unable or indisposed to take the more expensive chambers of the superior inns of court.

CONCLUSION.

Thus, at length, has the author brought his long labours to a close; thus has he endeavoured to hold up, as it were, a torch, to light the adventurer through the dusky porch of the law; and he wishes, in parting with him, to adopt the quaint but hearty and affectionate expressions with which our great master Coke closes his commentary upon Littleton:—

“ And for a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence, the loveliness of temperance, the stabilitie of fortitude, and the soliditie of justice !”

APPENDIX.

No. I.

THE COURSE OF LEGAL EDUCATION ADOPTED AT THE LAW SCHOOL IN HARVARD UNIVERSITY (U. S. AMERICA).

[*Vide ante*, p. 52, "*Supplemental Note*" to chapter I.—N. B. In the second number (pp. 345 *et seq.*) of a new legal quarterly periodical entitled the *Law Review* (Richards, Fleet Street), commenced since this work went to press, will be found an article, No. VI., briefly but strenuously urging the immediate establishment of a LEGAL UNIVERSITY in England.]

THE design of this institution, is to afford a complete course of legal education, for gentlemen intended for the Bar in any of the United States, and also a systematic course of studies in commercial jurisprudence, for those who intend to devote themselves exclusively to mercantile business and pursuits. The course of instruction for gentlemen intended for the Bar, embraces the various branches of Public and Constitutional Law, Admiralty, Maritime, Equity, and Common Law, which are common to all the United States, with occasional illustrations of Foreign Jurisprudence. The course of instruction for gentlemen intended for the mercantile profession, is more limited ; and embraces the *principal* branches only of commercial jurisprudence, to wit, the Law of Agency, of Partnership, of Bailments, of Bills of Exchange and Promissory Notes, of Insurance, of Shipping, Navigation, and other Maritime concerns, and of Sales, and, if the Students desire it, also of Constitutional Law. No public instruction is given in the local or peculiar municipal jurisprudence of any particular State ; but the students are assisted by the Professors, as occasion may require, in their private study of the law and practice peculiar to their own States.

No examination and no particular course of previous study are necessary for admission ; but the student is expected to produce testimonials of a good moral character.

Students may enter the School in any stage of their professional studies, or mercantile pursuits. But they are advised to enter at the beginning of those studies, rather than at a later period, as the most useful to themselves. They may also elect what particular studies they will pursue.

The course of studies is so arranged as to be completed in two years ; and, with reference to these studies, the students are divided into classes, according to their proficiency ; but after the first term of professional study, they are generally at liberty to join any one or more of the classes, in as many studies as they may choose, according to their view of their own wants and attainments.

The Academical year, which commences on the Friday after the fourth Wednesday in August, is divided into two terms of twenty weeks each, with a vacation of six weeks at the end of each term.

For the two Academical years, (the first commencing in the even-numbered years, viz. 1842, 1844, 1846, &c.) the following books are read with Professor STORY. *FIRST YEAR. First Term.* Marshall on Insurance ; Long on Sales ; Story on Equity Jurisprudence and Pleadings. *Second Term.* Story on Agency ; Story on Partnership ; Story on Equity Jurisprudence and Pleadings. *SECOND YEAR, commencing in the odd-numbered years (1843, 1845, &c.) First Term.* Story on Bills of Exchange ; Story on the Conflict of Laws ; Story on Equity Jurisprudence and Pleadings, as in the preceding year. *Second Term.* Abbot on Shipping ; Story on the Constitution ; Story on Equity Jurisprudence and Pleadings, as in the preceding year. The following books are read with Professor GREENLEAF. *FIRST YEAR. First Term.* Blackstone's Commentaries ; Greenleaf on Evidence ; Stephen on Pleading ; Chitty on Pleading. *Second Term.* Kent's Commentaries ; Cruise's Digest of the Law of Real Property. *SECOND YEAR. First Term.* Blackstone's Commentaries ; Story on Bailments ; Chitty on Contracts ; Angell and Ames on Cor-

porations. *Second Term.* Kent's Commentaries ; Cruise's Digest of the Law of Real Property. For gentlemen who remain in the Institution beyond two years, other studies are from time to time prescribed.

Instruction is given by recitations, by examinations, and by oral lectures and expositions, of which each Professor gives at least six, every week, to the several classes. A Moot Court is holden in each week, at which a cause, previously given out, is argued by four students, and an opinion is delivered by the presiding Professor.

All students who have pursued their studies in the Law School for three terms, or eighteen months ; or who, after having been admitted to the Bar, have pursued their studies in the Law School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, to the degree of Bachelor of Laws.

COURSE OF STUDY.

The books marked thus (*) compose the course which is completed in *two* years. The studies of gentlemen who remain longer in the School are pursued in other books in the *regular course*, to which others are added from time to time, as far as the leisure and progress of the Students may permit. The *parallel course* is prescribed chiefly for private reading.*

Regular Course.

- *Blackstone's Commentaries.
- Hoffman's Legal Outlines.
- *Kent's Commentaries.
- Wooddson's Lectures.

Parallel Course.

- De Lolme on the English Constitution (by Stephens).
- Hale's History of the Common Law.
- Hoffman's Course of Study.
- Lieber's Political and Legal Hermeneutics and Ethica.
- Reeves's History of the English Law.
- Sullivan's Lectures.
- Walker's Introduction.

* The ensuing lists of books are open to much observation, from which, however, the author of this work forbears ; not considering himself called upon to do so.—Even were this otherwise, he feels that an appendix is not the proper place for such remarks as he feels disposed to make upon the subject.—S. W.

LAW OF PERSONAL PROPERTY.

Regular Course.

• Angell and Ames on Corporations.
 Angell on Limitations.
 Bingham on Infancy.
 • Chitty on Contracts.
 • Chitty on Pleading.
 • Greenleaf on Evidence.
 • Long on Sales (Rand's edition).
 Roper on Husband and Wife.
 Selwyn's *Nisi Prius*.
 • Starkie on Evidence.
 • Stephen on Pleading.
 • Story on the Conflict of Laws.
 Wigram on the Interpretation of Wills.
 Williams on Executors.

Parallel Course.

Collinson on Idiots and Lunatics.
 Gould's System of Pleading.
 Hammond on Parties.
 Kyd on Awards.
 Leigh's *Nisi Prius*.
 Phillips on Evidence (by Cowen and Hill).
 Phillips on Evidence, 9th edition.
 Reeve's Domestic Relations.
 Roberts on the Statute of Frauds.
 Roper on Legacies.
 Saunders' Reports (Williams's edition).
 Select Cases in the Reports.
 Select titles in the Abridgments of Dane and Bacon.
 Shelford on Lunatics, &c.
 Starkie on Slander.

COMMERCIAL AND MARITIME LAW.

• Abbot on Shipping.
 Bayley on Bills.
 Browne's Admiralty Law.
 Collyer on Partnership.
 Fell on Guarantee.
 Gow on Partnership.
 Holt's Law of Shipping.
 Lawes on Charter Parties.
 • Marshall on Insurance.
 • Story on Agency.
 • Story on Bailments.
 • Story on Bills of Exchange.
 • Story on Partnership.
 Theobald on Principal and Surety.

Azuni's Maritime Law.
 Bacon's Abridgment, *tit. Merchant*.
 Bell's Commentaries on Commercial Law.
 Benecke on Insurance (by Phillips).
 Dane's Abridgment, Select titles.
 Livermore on Agency.
 Paley on Agency (by Lloyd).
 Phillips on Insurance.
 Roscoe on Bills.
 Select cases in the United States Courts.
 Stevens on Average (by Phillips).
 Watson on Partnership.

LAW OF REAL PROPERTY.

Adams on Ejectment (by Tillinghast).
 Chance on Powers.
 • Cruise's Digest.
 Fearn on Remainders (by Butler).

Angell on Water-Courses.
 Coke upon Littleton (Hargrave and Butler's edition).
 Dane's Abridgment, select Titles.

LAW OF REAL PROPERTY—*continued.*

Regular Course.

Jackson on Real Actions.
Powell on Mortgages (Coventry and Rand's edition).
Sanders on Uses and Trusts.
Stearns on Real Actions.
Sugden on Powers.
Sugden on Purchasers and Vendors.

Parallel Course.

Hayes on Limitations in Devises.
Lomax's Digest.
Powell on Devises (by Jarman).
Preston on Abstracts of Title.
Preston on Estates.
Roscoe on Actions respecting Real Property.
Runnington on Ejectment.
Select cases in the Reports.
Woodfall's Landlord and Tenant.

EQUITY.

Barton's Suit in Equity.
Calvert on Parties.
Eden on Injunctions.
Fonblanque's Equity.
Greasley on Evidence in Equity.
Jeremy's Equity Jurisdiction.
Maddock's Chancery.
Newland on Contracts in Equity.
*Story on Equity Jurisprudence.
*Story on Pleadings in Equity.
Wigram on Discovery.

Beames's Pleas in Equity.
Blake's Chancery.
Cooper's Pleadings in Equity.
Daniel's Chancery Practice.
Edwards on Receivers.
Gilbert's Forum Romanum.
Hoffman's Chancery Practice.
Hoffman's Master in Chancery.
Redesdale's Pleadings in Equity.
Select cases in the Reports.
Smith's Chancery Practice.

CRIMINAL LAW.

East's Pleas of the Crown.
Roscoe on Criminal Evidence.
Russell on Crimes.

Archbold's Pleading and Evidence.
Chitty's Criminal Law.
Select cases in the Reports.

CIVIL AND FOREIGN LAW.

Corpus Juris Civilis.
Gibbon's Roman Empire, Ch. 44.
Justinian's Institutes (by Cooper).
Justinian's Pandects (by Pothier).
Louisiana Civil Code and Code of Practice.
Pothier's Commercial Treatises.
Pothier on the Contract of Sale (by Cushing).

Ayliffe's Pandect of Roman Law.
Browne's Civil Law.
Butler's Horse Juridice.
Domat's Civil Law, Select Titles.
Foucher's Codes,
Irving's Introduction to the Civil Law.
Institutes of Spanish Law (translated by Johnston).

CIVIL AND FOREIGN LAW—continued.

Regular Course.

Pothier on Obligations.
 Toullier, *Droit Civil Français*, with
 the Supplements.

Parallel Course.

Niebuhr's History of Rome.
 The Spanish Partidas (by Moreau and
 Carleton).
 Van Leeuwen's Commentaries on the
 Dutch Law.

LAW OF NATIONS.

Martens's Law of Nations.
 Rutherford's Institutes.
 Vattel's Law of Nations.
 Wheaton on Captures.
 Wheaton on International Law.

Bynkershoek's Law of War.
 Grotius on the Law of War and
 Peace.
 Puffendorf on the Law of Nations.
 Ward's Law of Nations.

CONSTITUTIONAL LAW.

American Constitutions.
 *Story's Commentaries on the Con-
 stitution.

Rawle on the Constitution.
 Select cases and speeches.
 The Federalist.

No. II.

SPECIMENS OF EQUITY PLEADINGS.

(I.) A BILL IN EQUITY,

By a Purchaser against Vendor for specific performance of a Contract for sale of a Freehold Estate, charging that the purchase-money has remained unproductive in the Plaintiff's hands. The estate had been previously put up to sale by public auction and bought in, and the description in the agreement referred to in the particulars of Sale.*

IN CHANCERY.

To the Right Honourable John Singleton Lord Lyndhurst,
 Baron Lyndhurst of Lyndhurst, in the county of
 I. ADDRESS. Southampton, Lord High Chancellor of Great
 Britain,

* From Van Heythuysen's *Equity Draftsman*, by Hughes, 2d ed. (1828).
 Vol. 1, pp. 14 *et seq.*

HUMBLY COMPLAINING, sheweth unto your Lord-
 II. INTRODUCTION. ship, your Orator, Henry Annesley, of, &c.,
 Esquire,

THAT Stephen Dreddlington of York, in the county of York,
 III. STATING PART Esquire, being, or pretending to be, seised and
 (ON PREMISES). possessed of, or otherwise well entitled unto the
 freehold messuage or tenement, with the out-
 buildings, pleasure-grounds, pasture-land, and other the appur-
 tenances thereunto adjoining or belonging, situate and being at
 and in the parish of Yatton in the same county, and hereinafter
 mentioned, and the inheritance in fee-simple thereof, did, on or
 about the first day of May in the year 1844, cause all the said
 estate and hereditaments to be put up to sale by public auction by
 Mr. Winstanley, Auctioneer at Ripon, in the said county, in three
 lots, pursuant to printed particulars and conditions of sale previously
 advertised and published. And your Orator further sheweth, that
 the said premises were bought in by the said Stephen Dreddlington
 at the time of the said sale, and that, in or about the month of
 April then next ensuing, your Orator entered into a treaty with the
 said Stephen Dreddlington for the absolute purchase of the same
 estate and premises, together with the timber and other trees,
 fixtures and other effects, in and about the same, discharged from
 all incumbrances, at or for the price or sum of £90,000. And
 your Orator further sheweth unto your Lordship, that the said S. D.
 agreed to accept the said sum of £90,000 as the consideration for
 the said estate and premises ; and thereupon an Agreement in
 writing was entered into and signed by the respective solicitors
 for and on behalf of your Orator and the said S. D. respecting such
 sale and purchase, in the words and figures, or to the purport and
 effect following, that is to say : [*Here state the AGREEMENT ver-*
batim] ; as by the said Agreement, to which your Orator craves
 leave to refer when the same shall be produced, will appear. And
 your Orator further sheweth, that previously to the signing of the
 said Agreement your Orator paid unto the said S. D. the sum of
 £10,000 as a deposit and in part of his said purchase-money or
 sum of £90,000, and the said S. D. hath since delivered up pos-

session of the said purchased premises to your Orator. And your Orator further sheweth unto your Lordship, that he hath always been ready and willing to perform his part of the said Agreement, and on having a good and marketable title shewn to the said estate and premises, and a conveyance of the fee-simple thereof discharged of all incumbrances made to him, to pay the residue of the said purchase-money or sum of £90,000 to the said S. D. And your Orator had hoped that the said S. D. would have specifically performed his part of the said Agreement, as in justice and equity he ought to do. But now, so it is, may it please your Lordship,

that the said S. D. combining and confederating with divers persons at present unknown to your Orator, (whose names when discovered

your Orator prays he may be at liberty to insert herein with apt words to charge them as parties defendants hereto,) and contriving how to wrong and injure your Orator in the premises, absolutely refuses to perform his part of the said Agreement, and to colour such refusal HE GIVES OUT AND PRETENDS that he is unable to

make out a good and marketable title to the said estate and premises, and that he is willing to cancel the said Contract or Agreement and to repay the said deposit or sum of £10,000 to your Orator. Whereas your Orator charges that the said S. D. is able to make out a good marketable title to the said estate and premises if he thinks proper so to do, but that the said S. D. refuses and declines to make out a good and marketable title to the said premises notwithstanding your Orator hath required him so to do, and offered to pay him the residue of the purchase-money upon having the title made out, and a proper conveyance of the said premises executed to your Orator, his heirs and assigns, by the said S. D. And your Orator charges that the whole of the residue of his purchase-money of the premises hath been ready and unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of the said Agreement. ALL WHICH actings, refusals, and pre-

tences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orator in the premises. In consideration

IV. CONFEDERATING
PART.

V. CHARGING PART.

VI. JURISDICTION
CLAUSE.

whereof, and forasmuch as your Orator can have adequate relief in the premises in a Court of Equity, only, where matters of this nature are properly cognizable and relievable, To THE END therefore that the said S. D. and his confederates,

VII. INTERROGATING
PART.

when discovered, may upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and more especially that the said S. D. may answer and set forth in manner aforesaid, WHETHER he was not seised and possessed of or otherwise well entitled unto the said freehold messuage or tenement, with the out-buildings, pleasure-grounds, pasture lands, and other the appurtenances thereto adjoining or belonging, and the inheritance in fee simple thereof. And whether being so seised and entitled as aforesaid he did not at the time hereinbefore in that behalf mentioned, or at some other and what time, cause all the said estate and hereditaments to be put up to sale by public auction by the said Mr. Winstanley, at Ripon, in three lots, pursuant to printed particulars and conditions of sale previously advertised and published thereof. And whether the said premises were not bought in by him the said defendant at the time of the said sale, or how otherwise. And whether your Orator did not in or about the said month of April, or when else, enter into a treaty with the said defendant for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures, and other effects in and about the same, discharged from all incumbrances, at or for the price or sum of £90,000, or at some other and what price. And whether the said defendant did not agree to accept the said sum of £90,000 as the consideration of the said estate and premises. And whether thereupon such agreement in writing of such date, or of or to such purport and effect as hereinbefore in that behalf mentioned, was not duly entered into and signed by the respective solicitors for your Orator and the said defendant, in the name and on the behalf of your Orator and the said defendant, or how otherwise. And

whether your Orator did not previously to the signing of the said agreement pay the said defendant the sum of £10,000 as a deposit and in part of his said purchase-money or sum of £90,000. And whether the said defendant hath not since delivered up possession of the said purchased premises to your Orator. And whether your Orator hath not been always ready and willing to perform his part of the said Agreement, and on having a good and marketable title shewn to the said estate and premises, and a conveyance of the fee-simple thereof discharged of all incumbrances made to him, to pay the residue of the said purchase-money or sum of £90,000 to the said defendant. And whether the said defendant doth not and why refuse to perform his part of the said agreement. And whether the said defendant is not able to make a good and marketable title to the said estate and premises, and if not why not. And whether he doth not and why decline or refuse to make a good and marketable title to the said premises. And whether your Orator hath not required him so to do, and made such offer to him in that behalf aforesaid, or to that or the like or some or what other purport or effect. And whether the whole of the residue of the purchase-money of the said premises hath not been ready and unproductive in the hands of your Orator for completing the said purchase, from the time the same ought to have been completed by the terms of the said Agreement, or from some and what other time. *And that* the said defendant may be decreed SPE-

CIFICALLY TO PERFORM THE SAID AGREEMENT

VIII. PRAYER
FOR RELIEF.

entered into with your Orator as aforesaid, and to make a good and marketable title to the said premises, your Orator being ready and willing and hereby offering
§ Special Relief. specifically to perform the said Agreement on *his* part, and upon the said defendant's making out a good and marketable title to the aforesaid estate and premises, and executing a proper conveyance thereof to your Orator pursuant to the terms of the said Agreement, to pay to the said defendant the residue of the said purchase-money or sum of £90,000. And that your Orator may have *such further and other*
§ General Relief. *relief* in the premises as to your Lordship shall seem meet, and the nature of this case may

require. *May it please your Lordship to grant unto your Orator Her Majesty's* most gracious writ of subpoena* to be directed to the said S. D., thereby commanding him at a

IX. PRAYER FOR
SUBPOENA.

certain day, and under a certain pain therein to be limited, personally to be and appear before your Lordship in this honourable court, and then and there full, true, direct, and perfect ANSWER make to all and singular the premises, and further to stand to perform and abide such further order, direction, and decree therein as to your Lordship shall seem meet. And your Orator shall ever pray, &c.

SPENCER HORATIO WALPOLE.†

[To illustrate the distinction between a Bill in Equity and a Declaration at Law, here follows a

DECLARATION in SPECIAL ASSUMPSIT by a *Vendor* of an Estate in fee, sold by Public Auction, against the Purchaser, for DAMAGES for not completing the Purchase, and for not paying the Loss incurred on a subsequent re-sale of the Property.‡

IN THE QUEEN'S BENCH.

On the 1st day of May 1845.

MIDDLESEX to WIT.—Stephen Dreddlington (the plaintiff in this suit, by Arthur Runnington, his attorney,) complains of Henry Annesley (the defendant in this suit), who has been summoned to answer the said plaintiff in an action on promises. FOR THAT WHEREAS the plaintiff heretofore, to wit, on the 1st day of April in the year of our Lord 1845, by one Peter Winstanley, his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction, a certain messuage, orchard, garden, and premises, with the appurtenances, situate and being in the parish of Yatton in the county of York, [*here describe the premises shortly from the particulars of sale,*] upon and subject to the following amongst other

* In America—"The most gracious Writ of Subpoena of the State of _____," or, "of the U. S. of America."

† i. e. the counsel drawing the Bill.

‡ From Chitty on Pleading, vol. ii. pp. 179 *et seq.* (6th ed.) 1836.

conditions of sale, [*here are to be set out such parts of the conditions as have immediate reference to the cause of action and the breach,*] that is to say, that the highest bidder should be the purchaser; that the purchaser should immediately pay down into the hands of the auctioneer, that is to say, the said Peter Winstanley, five per cent. in part of the purchase-money, and enter into an agreement for payment of the residue of the said purchase-money on the 15th day of April then next ensuing, at which time he should have possession of the premises on having a good title, and that the auction duty payable to Government should be paid and borne by the vendor and purchaser in equal shares, and the purchaser should pay down his share thereof to the auctioneer at the time of sale; and that in case the purchaser should fail to comply with the said conditions the deposit money should be forfeited, and the vendor be at liberty to resell the said tenements with the appurtenances, and the deficiency, if any, together with all charges, should be made good by the defaulter, as by the said conditions of sale (reference being thereunto had) will amongst other things more fully and at large appear. And the plaintiff saith, that on the said exposure to sale, to wit, on the 1st day of April in the year aforesaid, the defendant was the highest bidder for and then became and was in due manner declared to be the purchaser of the said messuage, orchard, garden, and premises, with the appurtenances as aforesaid, at and for a certain large sum of money, to wit, the sum of £90,000. And *thereupon afterwards*, to wit, on the said day and year last aforesaid, in CONSIDERATION THEREOF, and that the plaintiff at the request of the defendant had then promised the defendant to perform and fulfil all things in the said conditions of sale contained on the part of the vendor to be performed and fulfilled, he the defendant then PROMISED the plaintiff to perform and fulfil every thing in the said conditions of sale on his part as such purchaser to be performed and fulfilled. And ALTHOUGH the defendant in *part performance* of the said terms and conditions of sale and of his said promise did then pay down a certain sum of money, to wit, the sum of £4,500, being at and after the rate of £5 per cent. as a deposit upon, and in part payment of, the said purchase-money, and did then

sign an agreement for the payment of the remainder of the said purchase-money on or before the said 15th day of April in the year aforesaid on having a good title, and although the plaintiff for a long time before, and upon and after the said 15th day of April in the year last aforesaid, was ready and willing to make and did make appear to the defendant a good and sufficient title in fee-simple of, in, and to the said tenements, with the appurtenances, so as to enable him the plaintiff to convey the same to the defendant in fee-simple as aforesaid, and to execute and cause to be executed proper conveyances thereof to the defendant, and afterwards, to wit, on the day and year last aforesaid, offered to the defendant to make and convey to him such good and sufficient title in fee-simple to the said tenements, with the appurtenances, upon payment of the remainder of the said purchase-money according to the said terms and conditions of sale, YET the defendant, *not regarding* the said terms and conditions of sale, nor his said promise, did not, nor would on or before the said 15th day of April in the year aforesaid, on having such good title as aforesaid, or at any other time, pay or cause to be paid to the plaintiff the remainder of the said purchase-money or any part thereof, but then wholly neglected and refused so to do, and wholly refused then or at any other time to complete the said purchase, or to accept a conveyance of the said tenements, with the appurtenances, to him the defendant. And thereupon the plaintiff afterwards, and after the said 15th day of April in the year last aforesaid, to wit, on the 28th day of April in the year of our Lord aforesaid, the day of re-sale or about, according to and by virtue of the said conditions of sale, again exposed the said tenements, with the appurtenances, to sale by public auction under and subject to certain terms and conditions of sale, and the same were then, at such last-mentioned exposure to sale as aforesaid, re-sold for a much less price or sum of money than the said price or sum for which the same had been so sold to the defendant as aforesaid, to wit, for the sum of £80,000, whereby there then was a deficiency between the said price for which the said tenements, with the appurtenances, were so sold to the defendant as aforesaid, and the said price for which the same were so sold on such

respects this Defendant submits to act as the Court shall direct upon being indemnified and paid her costs of this suit; And DENIES all *and all manner of unlawful combination and confederacy* wherewith she is by the said Bill charged, without this that there is any other matter, cause, or thing in the said Complainant's said Bill of Complaint contained material or necessary for this Defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant, all which matters and things this Defendant is ready and willing to aver, maintain, and prove as this Honourable Court shall direct, and humbly prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

THOMAS TURNER.*

(III.) A DEMURRER FOR MULTIFARIOUSNESS.†

IN CHANCERY.

The Demurrer of Jacob Johnson (Defendant) to the Bill of Complaint of Timothy Snooks.

This Defendant by protestation not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, *doth* DEMUR to the said Bill, *and for cause of demurrer* sheweth, that it appears by the said Bill that the same is exhibited against this Defendant and J. H., J. C., T. S., and W. T., for several and distinct matters and causes, in many whereof *as appears by the said Bill* this Defendant is not in any manner interested or concerned, by reason of which distinct matters the said Plaintiff's said bill is drawn out to a considerable length, and this Defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together which do not depend on each other in the said Bill, the pleadings, orders, and proceedings will in the progress of the

* Counsel's signature.

† 2 Van Heyth. Eq. Dr. p. 79.

said suit become and be intricate and prolix, and this Defendant put to unnecessary charges in taking copies of the same, although several parts thereof no way relate to or concern him, for which reason and for divers other errors appearing in this said Bill this Defendant doth demur thereto, and he prays the judgment of this Honourable Court whether he shall be compelled to make any further or other answer to the said Bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

W. P. WOOD.*

(IV.) A GENERAL DEMURER FOR WANT OF EQUITY.†

IN CHANCERY.

The Demurrer of Gabriel Garsill Defendant to the Bill of Complaint of Henry Stephens Complainant.

The Defendant by protestation not confessing or acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, *doth demur* in law to the said Bill, and for cause of demurrer sheweth, that the said Complainant hath not by his said Bill made such a case as entitles him in a Court of Equity to any discovery or relief from or against this Defendant touching the matters contained in the said Bill or any of such matters. Wherefore, and for divers other good causes of demurrer appearing in the said Bill of Complaint, this Defendant doth demur to the said Bill and to all the matters and things therein contained, and pray^s the judgment of this Honourable Court whether he shall be compelled to make any further or other answer to the said Bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

R. HEATHFIELD.

* Counsel's Signature.

† 2 Van. Heyth. Eq. Dr. p. 79.

No. III.

ARCHDEACON PALEY'S ACCOUNT OF THE CAUSES OF THE
NUMEROUS UNCERTAINTIES AND DIFFICULTIES ARISING
IN THE ADMINISTRATION OF JUSTICE.*

To a mind revolving the subject of human jurisprudence, there frequently occurs this question — *Why, since the maxims of natural justice are few and evident, do there arise so many doubts and contradictions in their application?* Or, in other words, how comes it to pass, that although the principles of the law of nature be simple, and for the most part sufficiently obvious, there should exist nevertheless, in every system of municipal laws, and in the actual administration of relative justice, numerous uncertainties, and acknowledged difficulty? Whence, it may be asked, so much room for litigation, and so many subsisting disputes, if the rules of human duty be neither obscure nor dubious? If a system of morality, containing both the precepts of revelation and the deductions of reason, may be comprised within the compass of one moderate volume; and the moralist be able, as he pretends, to describe the rights and obligations of mankind, in all the different relations they may hold to one another; what need of those codes of positive and particular institutions, of those tomes of statutes and reports, which require the employment of a long life even to peruse? And this question is immediately connected with the argument which has been discussed in the preceding paragraph: for, unless there be found some greater uncertainty in the law of nature, or what may be called natural equity, when it comes to be applied to real cases and to actual adjudication, than what appears in the rules and principles of the science, as delivered in the writings of those who treat of the subject, it were better that the determination of every cause should be left to the conscience of the judge, unfettered by precedents and authorities; since the very purpose for which these are introduced, is to give a certainty to judicial proceedings, which such proceedings would want without them.

* Moral and Political Philosophy, book VI. c. viii.

Now, to account for the existence of so many sources of litigation, notwithstanding the clearness and perfection of natural justice, it should be observed, I. that *treatises of morality always suppose facts to be ascertained ; and not only so, but the intention likewise of the parties to be known, and laid bare.* For example : when we pronounce that promises ought to be fulfilled in that sense in which the promiser apprehended, at the time of making the promise, the other party received and understood it ; the apprehension of one side, and the expectation of the other, must be discovered, before this rule can be reduced to practice, or applied to the determination of any actual dispute. Wherefore the discussion of facts which the moralist supposes to be settled, the discovery of intentions which he presumes to be known, *still remain to exercise the inquiry of courts of justice.* And as these facts and intentions are often to be inferred, or rather conjectured, from *obscure indications, from suspicious testimony, or from a comparison of opposite and contending probabilities,* they afford a never-failing supply of doubt and litigation. For which reason, the science of morality is to be considered rather as a *direction to the parties who are CONSCIOUS of their own thoughts and motives and designs, TO WHICH CONSCIOUSNESS, the teacher of morality,* constantly appeals ; than as a guide to the judge, or to any third person, whose arbitration must proceed upon rules of evidence, and maxims of credibility, *with which the moralist has no concern.*

II. There exist a multitude of cases, in which the law of nature, that is, the law of public expediency, *prescribes nothing,* except that SOME CERTAIN RULE be adhered to, and that the rule actually established, be preserved ; it either being indifferent what rule obtains, or, out of many rules, no one being so much more advantageous than the rest, as to recompense the inconvenience of an alteration. In all SUCH cases, *the law of nature* sends us to the LAW of the LAND. She directs that either some fixed rule be introduced by an act of the legislature, or that the rule which accident, or custom, or common consent, hath already established, be steadily maintained. Thus, in the descent of lands, or the succession to personals from intestate proprietors, whether the kindred of the grandmother, or of the great-grandmother, shall be

preferred in the succession ; whether the degrees of consanguinity shall be computed through the common ancestor, or from him ; whether the widow shall take a third or a moiety of her husband's fortune : whether sons shall be preferred to daughters, or the elder to the younger ; whether the distinction of age shall be regarded amongst sisters, as well as between brothers ; *in these*, and in a great variety of questions which the same subject supplies, *the law of nature determines nothing*. The only answer she returns to our inquiries is, that some certain and general rule be laid down by public authority ; be obeyed when laid down ; and that the quiet of the country be not disturbed, nor the expectation of heirs frustrated, by capricious innovations. This silence or neutrality of the law of nature, which we have exemplified in the case of intestacy, holds concerning a great part of the questions that relate to the right of acquisition of property. Recourse then must necessarily be had to statutes, or precedents, or usage, *to fix what the law of nature has left loose*. The interpretation of these statutes, the search after precedents, the investigation of customs, compose therefore an unavoidable, and at the same time a large and intricate, portion of forensic business. Positive constitutions or judicial authorities are, in like manner, wanted to give precision to many things which are in their nature *indeterminate*. The age of legal discretion ; at what time of life a person shall be deemed competent to the performance of any act which may bind his property ; whether at twenty, or twenty-one, or earlier or later, or at some point of time between these years ; can be ascertained only by a positive rule of the society to which the party belongs. *The line has not been drawn by nature* ; the human understanding advancing to maturity by insensible degrees, and its progress varying in different individuals. Yet it is necessary, for the sake of mutual security, that a precise age be fixed, and that what is fixed be known to all. It is on these occasions that the intervention of law supplies the inconstancy of nature. Again, there are other things which are perfectly *arbitrary*, and capable of no certainty but what is given to them by positive regulation. It is fit that a limited time should be assigned to defendants, to plead to the complaints alleged against them ; and also that the

default of pleading within a certain time should be taken for a confession of the charge ; but to how many days or months that term should be extended, though necessary to be known with certainty, cannot be known at all by any information which the law of nature affords. And the same remark seems applicable to almost all those rules of proceeding, which constitute what is called the practice of the court ; as they cannot be traced out by reasoning, they must be settled by authority.

III. In contracts, whether express or implied, which involve a great number of conditions ; as in those which are entered into between masters and servants, principals and agents ; many also of merchandise, or for works of art ; in some likewise which relate to the negotiation of money or bills, or to the acceptance of credit or security : the original design and expectation of the parties was, that both sides should be guided by the course and custom of the country in transactions of the same sort. Consequently, when these contracts come to be disputed, natural justice can only refer to that custom. But as such customs are not always sufficiently uniform or notorious, but often to be collected from the production and comparison of instances and accounts repugnant to one another ; and each custom being only that, after all, which amongst a variety of usages seems to predominate ; we have here also ample room for doubt and contest.

IV. As the law of nature, founded in the very construction of human society, which is formed to endure through a series of perishing generations, requires that the just engagements a man enters into should continue in force beyond his own life ; it follows that *the private rights of persons frequently depend upon what has been transacted, in times remote from the present, by their ancestors or predecessors, by those under whom they claim, or to whose obligations they have succeeded.* Thus the questions which usually arise between lords of manors and their tenants, between the king and those who claim royal franchises, or between them and the persons affected by these franchises, depend upon the terms of the original grant. In like manner, every dispute concerning tithes, in which an exemption or composition is pleaded, depends upon the agreement which took place between the predecessor of the claimant

and the ancient owner of the land.* The appeal to these grants and agreements is dictated by natural equity, as well as by the municipal law ; but concerning the existence, or the conditions, of such old covenants, doubts will perpetually occur, to which the law of nature affords no solution. The loss or decay of records, the perishableness of living memory, the corruption and carelessness of tradition, all conspire to multiply uncertainties upon this head ; what cannot be produced or proved, must be left to loose and fallible presumption. Under the same head may be included another topic of altercation ;—the tracing out of boundaries, which time, or neglect, or unity of possession, or mixture of occupation, has confounded or obliterated. To which should be added, a difficulty which often presents itself in disputes concerning rights of way, both public and private, and of those easements which one man claims in another man's property ; namely, that of distinguishing, after a lapse of years, *the use of an INDULGENCE* from *the exercise of a right*.

V. The *quantity* or *extent* of any injury, even when the cause and author of it are known, is often dubious and undefined. If the injury consist in the loss of some specific right, the value of the right measures the amount of the injury ; but what a man may have suffered in his person, from an assault ; in his reputation, by slander ; or in the comfort of his life, by the seduction of a wife or daughter ; or what sum of money shall be deemed a reparation for damages such as these ; cannot be ascertained by any rules which the law of nature supplies. The law of nature commands, that reparation be made ; and adds to her command, that, when the aggressor and the sufferer disagree, the damage be assessed by authorised and indifferent arbitrators. Here then recourse must be had to courts of law, not only with the permission, but in some measure by the direction, of natural justice.

VI. When controversies arise in the interpretation of written laws, they for the most part arise upon *some contingency which the*

* It may be as well here to apprise the student of the grand legislative operation recently effected for commuting the tithes of every parish into a rent-charge, the amount of which is to be adjusted annually according to the average price of corn. See stat. 6 & 7 Will. IV., c. 71, amended by several subsequent statutes.

composer of the law did not foresee or think of. In the adjudication of such cases, this dilemma presents itself : if the laws be permitted to operate only upon the cases which were actually contemplated by the law-makers, they will always be found defective : if they be extended to every case to which the reasoning, and spirit, and expediency, of the provision seem to belong, without any farther evidence of the intention of the legislature, we shall allow to the judges a liberty of applying the law, which will fall very little short of the power of making it. If a literal construction be adhered to, the law will often fail of its end : if a loose and vague exposition be admitted, the law might as well have never been enacted ; for this license will bring back into the subject all the discretion and uncertainty which it was the design of the legislature to take away.* Courts of justice are, *and always must be*, embarrassed by these opposite difficulties ; and as it never can be known beforehand, in what degree either consideration may prevail in the mind of the judge, there remains an unavoidable cause of doubt, and a place for contention.

VII. The deliberations of courts of justice upon every new question, are encumbered with additional difficulties, in consequence of the authority which the judgment of the court possesses, as a PRECEDENT to future judicatures ; which authority appertains not only to the conclusions the court delivers, but to the principles and arguments upon which they are built. The view of this effect makes it necessary for a judge to look beyond the case before him ; and, beside the attention he owes to the truth and justice of the cause between the parties, to reflect whether the principles, and maxims, and reasoning, which he adopts and authorises, can be applied with safety to all cases which admit of a comparison with the present. The decision of the cause, were the effects of the decision to stop there, might be easy ; but the consequence of establishing the principle which such a decision assumes, may be difficult, though of the utmost importance, to be foreseen and regulated.

VIII. After all the certainty and rest that can be given to

* *Vide ante*, pp. 415 *et seq.*, for a discussion of the difficult question as to the limits of *judicial interpretation*, and of *legislation*.

points of law, either by the interposition of the legislature or the authority of precedents, one principal source of disputation, and into which indeed the greater part of legal controversies may be resolved, will remain still, namely, "*the competition of opposite analogies.*" When a point of law has been once adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute; but questions arise, which resemble this only indirectly and in part, in certain views and circumstances, and which may seem to bear an equal or a greater affinity to other adjudged cases: questions which can be brought within any fixed rule only by analogy, and which hold a relation by analogy to different rules. *It is by the urging of the different analogies that the contention of the bar is carried on:* and it is in the comparison, adjustment, and reconciliation, of them with one another; in the discerning of such distinctions; and in the framing of such a determination, as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger; that the sagacity and wisdom of the court are seen and exercised. Amongst a thousand instances of this, we may cite one of general notoriety, in the contest that has lately been agitated concerning literary property.* The personal industry which an author expends upon the composition of his work, bears so near a resemblance to that by which every other kind of property is earned, or deserved, or acquired; or rather there exists such a correspondency between what is created by the study of a man's mind, and the production of his labour in any other way of applying it, that he seems entitled to the same exclusive, assignable, and perpetual right in both; and that right to the same protection of law. This was the analogy contended for on one side. On the other hand, a book, as to the author's right in it, appears similar to an invention of art, as a machine, an engine, a medicine: and since the law permits these to be copied, or imitated, except where an exclusive use or sale is reserved to the inventor by patent, the same liberty should be allowed in the publication and sale of books.

* Paley is here alluding to the famous case of *Millar v. Taylor*, reported in 4 Burrow's Rep. 2303, which was argued in the year 1769.

This was the analogy maintained by the advocates of an open trade. And the competition of these opposite analogies constituted the difficulty of the case, as far as the same was argued, or adjudged, upon principles of common law.—One example may serve to illustrate our meaning : but whoever takes up a volume of Reports, will find most of the arguments it contains, capable of the same analysis ; although the analogies, it must be confessed, are sometimes so entangled as not to be easily unravelled, or even perceived.

Doubtful and obscure points of law are not however nearly so numerous as they are apprehended to be. Out of the multitude of causes which, in the course of each year, are brought to trial in the metropolis, or upon the circuits, there are few in which any point is reserved for the judgment of superior courts. Yet these few contain all the doubts with which the law is chargeable : *for as to the rest*, the uncertainty, as hath been shown above, is NOT in the law, *but in the means of human information.*

No. IV.

THE RULES OF COURT BY WHICH THE SYSTEM OF COMMON LAW PLEADING HAS BEEN RE-MODELLED, PURSUANT TO THE LAW AMENDMENT ACT (STAT. 3 & 4 WILL. IV., C. 42, § 1).

WHEREAS it is provided by the stat. 3 & 4 Will. 4, c. 42, s. 1, that the Judges of the Superior Courts of Common Law at Westminster, or any eight or more of them, of whom the Chiefs of each of the said Courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect [this period was enlarged by stat. 1 & 2 Vict., c. 100, to five years, from the 1st Nov., 1838], *make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and*

other proceedings in actions at law, and such regulations as to the *payment of costs*, and otherwise, for carrying into effect the said alterations, as to them might seem expedient ; which rules, orders, and regulations were to be laid before both Houses of Parliament as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but after that time should be binding and obligatory on the said Courts, and all other Courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament ;

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do, by virtue of any act of Parliament then or thereafter to be in force ;—[But by stat. 5 & 6 Vict. c. 97, § 3, this privilege was taken away in all cases where it had been conferred by “ *public, local, and personal*,” or “ *local and personal* ” acts, or acts of “ *a local and personal nature*.” Also by R. G. Trin. Term, 1 Vict. the defendant when he pleads this statutory plea of Not Guilty, must give the plaintiff notice of it, by inserting the words “ By Statute ” in the margin of the plea].

IT IS THEREFORE ORDERED, That, from and after the first day of Easter Term next inclusive, unless Parliament shall in the meantime otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force :—

First General Rules and Regulations.

1. Every pleading as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

2. No entry or continuances by way of imparlance, curia advisari vult, vicecomes non misit breve, or OTHERWISE, *shall be made*, upon any record or roll whatever, or in the pleadings, except the juratur ponitur in respectu, which is to be retained.

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea puis darrien continuance is now by law pleadable in Banc, or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a Judge shall otherwise order.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided, that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and, by the said Act of the 3 & 4 Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged:

Several counts shall not be allowed, unless a distinct *subject-matter of complaint* is intended to be established in respect of each; nor shall *several* pleas, or avowries, or cognisances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter

of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed ; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So, counts for not accepting and paying for goods sold ; and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint ; for the debt and the security are different contracts, and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But, a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But, a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty are not to be allowed.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged in *indebitatus assumpsit* to be

due in respect of several matters, ex. gr. for wages, work, and labour as a hired servant, *work and labour generally*, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided, that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging *more breaches* than one of the same contract in the same count.

Pleas, avowries, and cognisances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule), are not to be allowed.

Ex. gr. Pleas of solvit ad diem, and of solvit post diem, are both pleas of payment, varied in the circumstances of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of *A. B.*, in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed.

But, pleas of an agreement to accept the security of a third person, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass quare clausum fregit, pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to

an easement there—pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But, pleas of right of common *at all times* of the year, and of such right at *particular times*, or in a *qualified* manner, are not to be allowed.

So, pleas of a right of way over the locus in quo, varying the termini or the *purposes*, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But, avowries for distress for rent, varying the amount of rent reserved, or the *times* at which the *rent is payable*, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate ; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognisance, shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognisances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances, introduced in violation of the rule, be struck out at the cost of the party pleading ; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that *some distinct subject-matter* of complaint is bonâ fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied ; and shall also specify the counts, pleas, avowries, or cognisances, mentioned in such application, which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect

of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognisance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognisance, including those of the evidence as well as those of the pleadings: and further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognisance, allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which *he succeeds*, arising out of any count, plea, avowry, or cognisance with respect to which the Judge shall so certify.

8. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the *body* of the declaration, or in any subsequent pleading.

Provided, that, in cases where local description is now required, such local description shall be given.

9. In a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without

such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in the maintenance of the whole action; provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

10. No formal defence shall be required in a plea, and it shall commence as follows:—"The said defendant, by —, his attorney, (*or*, in person, &c.), says that —"

11. It shall not be necessary to state in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial.

14. The form of a demurrer shall be as follows:—"The said defendant, by —, his attorney, [*or*, in person, &c., *or*, plaintiff], says that the declaration [*or*, plea, &c.] is not sufficient in law," *showing the special causes of demurrer, if any.*

The form of a joinder in demurrer shall be as follows:—"The said plaintiff [*or*, defendant] says that the declaration [*or*, plea, &c.] is sufficient in law."

15. *The entry* of proceedings on the record for trial, or on the judgment-roll, (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatever.

16. No fees shall be charged in respect of more than *one issue* by any of the officers of the Court, or of any Judge at the Assizes, or any other officer, in any action of assumpsit, or in any action of *debt* on simple contract, or in any action on *the case*.

17. When money is paid into Court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis* :—

“ *C. D.* } The — day of —
 ats. }

A. B. } The defendant, by —, his attorney, [*or*, in person, &c.], says that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of £—, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [*or, in actions of debt*, that he is not [now, “*never was*”—*R. G. Trin. Term, 1838*, which gives a new form of plea] indebted to the plaintiff] to a greater amount than the said sum, &c., in respect of the cause of action in the declaration mentioned, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action.

18. No rule or Judge’s order to pay money into Court shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21; but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, “that he has sustained damages [*or, that the defendant is indebted to him, as the case may be*] to a greater amount than the said sum;” and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in which, after a plea in abatement of the nonjoinder of another person, the plaintiff shall, without having proceeded to trial on an issue

thereon, commence another action against the defendant or defendants in the action, in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form :—

“ *Venue.*]—*A. B.*, by *E. F.*, his attorney, [*or*, in his own proper person, &c.], complains of *C. D.* and *G. H.*, who have been summoned to answer the said *A. B.*, and which said *C. D.* has heretofore pleaded in abatement the nonjoinder of the said *G. H.*, &c.”

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I.—*Assumpsit.*

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and

in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; ex. gr. the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; ex. gr., infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

4. In actions on policies of assurance the interest of the assured may be averred thus:—"That *A.*, *B.*, *C.*, and *D.* [*or*, some or one of them], were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

II.—*In Covenant and Debt.*

1. In debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded,

including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "nil debet" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of assumpsit.

4. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III.—*Detinue.*

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

IV.—*In Case.*

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Ex. gr. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the

occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action on the case, for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and, in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In this form of action against a carrier the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

V.—*In Trespass.*

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated, in the declaration by name or abutments, or other description, in failure whereof the defendant may demur specially.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. In actions of trespass *de bonis asportatis*, the plea of not

guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a *right of way* with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found: and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.*, horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Issues, Judgments, and other Proceedings in Actions commenced by Process under 2 Will. 4, c. 39, shall be in the several Forms in the Schedule hereunto annexed, or to the like effect, mutatis mutandis: Provided, that, in case of Non-compliance, the Court or a Judge may give leave to amend.

No. 1.

Form of an Issue in the Queen's Bench, Common Pleas, or Exchequer.

In the Queen's Bench ; or,

In the Common Pleas ; or,

In the Exchequer.

The [date of declaration] day of —, in the — year of our Lord 18—

[Venus.]—A. B., by E. F., his attorney, [or, in his own proper person, or, by E. F., who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of twenty years, as the next friend of the said A. B., as the case may be], complains of C. D., who has been summoned to answer the said A. B., by virtue [or, served with a copy, as the case may be] of a writ issued on [date of first writ] the — day of —, in the year of our Lord 18—, out of the Court of our Lady the Queen, before the Queen herself at Westminster [or, out of the Court of our Lady the Queen, before her Justices at Westminster, or, out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, as the case may be] ; For that

[Copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.]

Thereupon the Sheriff is commanded that he cause to come here, on the — day of —, twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.

No. 2.

*Form of Nisi Prius Record in the Queen's Bench, Common Pleas,
or Exchequer.*

[*The placita are to be omitted. Copy the issue to the end of the award of the venire, and proceed as follows :*]

Afterwards, on the [*teste of distringas or habeas corpora*] day of —, in the year —, the Jury between the parties aforesaid is respited here until the [*return day of distringas or habeas corpora*] day of —, unless — shall first come on the [*first day of sittings or commission day of assizes*] day of —, at —, according to the form of the statute in such case made and provided for default of the Jurors, because none of them did appear ; therefore let the Sheriff have the bodies of the said Jurors accordingly.

[*The postea is to be in the usual form.*]

No. 3.

Form of Judgment for the Plaintiff in Assumpsit.

[*Copy the issue to the end of the award of the venire, and proceed as follows :*]

Afterwards, the Jury between the parties is respited until the [*return of distringas or habeas corpora*] day of —, unless — shall first come on the [*day of sittings or Nisi Prius*] day of —, at —, according to the form of the statute in that case made and provided, for default of the Jurors, because none of them did appear.

Afterwards, on the [*day of signing final judgment*] day of — come the parties aforesaid, by their respective attornies aforesaid [*or, as the case may be*] ; and —, before whom the said issue was tried, hath sent hither his record, had before him, in these words :

[*Copy postea.*]

Therefore, it is considered that the said *A. B.* do recover,

against the said *C. D.*, his said damages, costs, and charges, by the Jurors aforesaid, in form aforesaid, assessed ; and also — for his costs and charges, by the Court here adjudged of increase to the said *A. B.* with his assent, which said damages, costs, and charges, in the whole amount to — ; and the said *C. D.* in mercy, &c.

No. 4.

Form of the Issue when it is directed to be tried by the Sheriff.
[After the joinder of issue proceed as follows:]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon on the [*teste of writ of trial*] day of —, in the year —, pursuant to the statute in that case made and provided, the Sheriff [*or, the Judge of —, being a Court of Record for the recovery of debt in the said county, as the case may be,*] is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly : and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the Jury thereon indorsed, on the — day of —, &c.

No. 5.

Form of the Writ of Trial.

Victoria, by, &c., to the Sheriff of our County of —,
 [*or, to the Judge of —, being a Court of Record for the Recovery of Debt, in our County of —, as the case may be.*]

Whereas *A. B.*, in our Court before us at Westminster [*or, in our Court before our Justices at Westminster, or, in our Court before the Barons of our Exchequer at Westminster, as the case may be*], on the [*date of first writ of summons*] day of — last

impleaded *C. D.* in an action on promises [*or, as the case may be*]; for that whereas one, &c. [*here recite the declaration as in a writ of inquiry*], and thereupon he brought suit. And whereas the defendant, on the — day of — last, by — his attorney [*or, as the case may be*], came into our said Court and said [*here recite the pleas and pleadings to the joinder of issue*], and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*; and it is fitting that the issue above joined should be tried before you the said Sheriff of — [*or, Judge, as the case may be*]: we, therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly: and when the same shall have been tried in manner aforesaid, we command you that you make known to us at Westminster [*or, to our Justices at Westminster, or, to the Barons of our said Exchequer, as the case may be*], what shall have been done by virtue of this writ, with the finding of the Jury hereon indorsed, on the — day of — next.

Witness, — at Westminster, the — day of —, in the — year of our reign.

No. 6.

Form of Indorsement thereon of the Verdict.

Afterwards, on the [*day of trial*] day of —, in the year —, before me, Sheriff of the County of — [*or, Judge of the Court of —*], came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within-named [*or, as the case may be*], and the Jurors of the Jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned on their oath, said, that —.

No. 7.

Form of Indorsement thereon, in case a Nonsuit takes place.

[*After the words "duly sworn to try the issue within mentioned," proceed as follows :*]

And were ready to give their verdict in that behalf ; but the said *A. B.*, being solemnly called, came not, nor did he further prosecute his said suit against the said *C. D.*

No. 8.

Form of Judgment by the Plaintiff after Trial by the Sheriff.

[*Copy the issue, and then proceed as follows :*]

Afterwards, on the [*day of signing judgment*] day of —, in the year —, came the parties aforesaid, by their respective attornies aforesaid, [*or, as the case may be*], and the said Sheriff, [*or, Judge, as the case may be*], before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words ; to wit :—

[*Copy the Indorsement.*]

Therefore it is considered, &c., [*in the same form as before*].

No. V.

SPECIMENS OF DECLARATIONS, IN ACTIONS REAL, MIXED,
AND PERSONAL.

I.—DECLARATIONS IN REAL ACTIONS.

I.—COUNT IN DOWER.

IN THE COMMON PLEAS.

Trinity Term, in the eighth year of the reign of Queen Victoria.

Derbyshire, to wit.—Ann Bowers, widow, who was the wife of Edward Bowers, deceased, by Thomas Brown, her attorney, demands against Charles Davies THE THIRD PART of ten messuages, ten barns, ten stables, four gardens, four orchards, two thousand acres of meadow, two thousand acres of pasture, and two thousand acres of other land, with the appurtenances, in the parish of Cartmel, in the county of Derby, as the dower of the said Ann Bowers, of the endowment of the said Edward Bowers, deceased, heretofore her husband, whereof she *hath nothing, &c.**

II.—DECLARATION IN QUARE IMPEDIT.

IN THE COMMON PLEAS.

Trinity Term, in the eighth year of the reign of Queen Victoria.

Durham, to wit.—Thomas, Bishop of Durham, Christopher Dickins, Esq., and Edward Fuller, clerk, were summoned to answer Agnes Birch, widow, of a plea that they permit the said Agnes Birch to present a fit person to the rectory of the parish church of Stinville, in the county of Durham, which is vacant, and belongs

* There are two kinds of Dower ; one a Writ of Right of Dower, applicable when a part having been assigned to the widow, she claims the residue. The second is a Writ of Dower, *i. e.*, when *nothing* has been yet assigned her ; and the above is a precedent of the latter kind.

to her presentation. And, thereupon, the said Agnes Birch, by William Rawlins, her attorney, complains, that whereas one Sir John Dewhurst, Baronet, now deceased, in his lifetime, to wit, on the 2nd day of October, in the year of our Lord one thousand eight hundred and thirty-seven, was seised of the manor of Kelsay, in the county aforesaid, with its appurtenances (to which manor the advowson of the said rectory with its appurtenances then belonged) in his demesne as of fee.* And being so seised thereof as aforesaid, the said Sir John Dewhurst, afterwards, to wit, on the day and year last aforesaid, presented to the said church, being then vacant, one Eugene Godfrey, his clerk, who on the presentation of the said Sir John Dewhurst was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign lady Victoria, Queen of Great Britain and Ireland. And the said Sir John Dewhurst being so seised of the said manor, and the said advowson belonging thereto as aforesaid, afterwards, to wit, on the 1st day of January, in the year of our Lord one thousand eight hundred and forty-five, died so seised of such estate therein, upon whose death the said manor, with the said advowson so belonging thereto, descended to the said Agnes Birch, as daughter and heiress of the said Sir John Dewhurst, whereby she became and was seised of the said manor, with the said advowson so belonging thereto, in her demesne as of fee. And being so seised, the said church afterwards, to wit, on the 11th day of February, in the year last aforesaid, became vacant by the death of the said Eugene Godfrey, whereby it then belonged, and now belongs, to the said Agnes Birch, to present a fit person to the said church, so being vacant as aforesaid; but the said Bishop, Christopher Dickins, and Edward Fuller, will not permit her, but unjustly hinder her; wherefore she, the said Agnes Birch, saith that she is injured, and hath sustained damage† to the value of ten thousand pounds, and therefore she brings her suit, &c.

* See these words explained in Littleton, § 10, & 2 Bla. Comm. 106-7.

† The student will note *this claim of damages*, in a *REAL* action. It is because they were expressly given in this case, *by statute of WESTMINSTER II.* 13 Edw. I. c. 5, § 3.

II.—DECLARATION IN THE MIXED ACTION.

EJECTMENT.

IN THE QUEEN'S BENCH.

Trinity Term, in the eighth year of the reign of Queen Victoria.

Kent, to wit.—Richard Roe was attached to answer John Doe of a plea of trespass and ejectment, and thereupon the said John Doe, by Samuel Sly, his attorney, complains against the said Richard Roe: For that whereas Abraham Bates, heretofore, to wit, on the 21st day of June, in the year of our Lord one thousand eight hundred and forty-four, had demised to the said John Doe, five messuages, five stables, five yards, and five gardens, situate and being in the parish of Milton next Gravesend, in the county of Kent, to have and to hold the same to the said John Doe and his assigns from the twenty-fourth day of June, in the year aforesaid, for and during and unto the full end and term of fourteen years thence next ensuing, and fully to be complete and ended; by virtue of which said demise the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed for the said term, so to him thereof granted as aforesaid; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 1st day of December, in the year aforesaid, with force and arms entered into the said tenements with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then did, against the peace of our lady the Queen, and to the damage of the said John Doe, of two hundred pounds, and therefore he brings his suit, &c.

TO MR. HENRY HUNT.*

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector only,

* This is the notice of the proceedings to the tenant in possession, and must always be subscribed to the declaration.

and having no claim or title to the same, advise you to appear in next Trinity Term, in Her Majesty's Court of Queen's Bench, wheresoever Her Majesty shall then be in England, by some attorney of that Court, and then and there, by rule of the same Court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession.—Dated this 12th day of May, in the year of our Lord 1845.

Yours, &c.

RICHARD ROE.

III.—PERSONAL ACTIONS.

I.—ACTIONS *Ex Contractu*.

I.—DEBT.

1. *Special Count on a Deed, whereby the Testator appointed £5000 to be paid to the Plaintiff, on the event of the Testator's Death.**

IN THE QUEEN'S BENCH.

The 1st day of June, in the year of our Lord, 1845.

Yorkshire, to wit.—John Hunt, the plaintiff in this suit, by Simon Brittell, his attorney, complains of Mary Jackson and James Cummings, the defendants in this suit, executrix and executor of the last will and testament of Luke Flower, deceased, who have been summoned to answer the said plaintiff, in an action of debt; and he demands of the said Mary Jackson and James Cummings, as such executrix and executor as aforesaid, the sum of £——, which they unjustly detain from him. For that whereas, in the lifetime of the said Luke Flower, and before the commencement of this suit, to wit, on the first day of January, in the year of our Lord 1836, by a certain deed-poll then made by the said Luke Flower in his lifetime, bearing date the day and year aforesaid, sealed with his seal, and to the Court of our said Lady the Queen now here shown, the said Luke Flower did, for the

* 2 Chitt. Plead. 276 (6th ed.) This form was settled by an eminent barrister [A. D. 1815], and the plaintiff recovered a verdict.—*Id.* ib.

provision and relief of the said plaintiff, in such deed-poll described as the only son of Edward Hunt deceased, his the said Luke Flower's aunt's son and first cousin, thereby grant, assign, and deliver over unto the said plaintiff the sum of £5000, immediately after the said plaintiff should have attained the age of twenty-one years, for and in consideration of the love and affection the said Luke Flower always bore for the said Edward Hunt, the said father of the said plaintiff, and in consideration of the several services the said Edward Hunt had theretofore rendered the said Luke Flower in his lifetime : and the said Luke Flower thereby then declared, that the said sum of £5000 so granted, should and might be recovered from and off all or any part of his the said Luke Flower's estates, lands, premises, goods, chattels, and so forth, wherever the same might be situated, for the sole use and behoof of the said plaintiff : and the said Luke Flower thereby declared that the said £5000, or any part thereof, or the interest or interests thereupon arising, or which might thereafter at any time arise or grow due, should not upon any pretext extend or be granted to any other person or persons after the decease of him the said plaintiff, wherever the same might happen to be : but that the aforesaid grant of £5000 should be prudently and carefully appropriated for the said plaintiff, excluding heirs, assigns, or survivors of any description whatsoever : and in case of his (the said Luke Flower's) decease, at any time before the said plaintiff should have attained the aforesaid age of twenty-one years, that then and in such case it should and might be lawful for the said plaintiff, or his lawful attorney, duly nominated, to enter upon and recover the said sum as thereinbefore recited, in any of Her Majesty's Courts in Great Britain, as counsel learned in the law should direct or advise, or devise : and the said Luke Flower did thereby nominate, constitute, and appoint John Blackwell, uncle of the said plaintiff, to be principal guardian and trustee to him, in the economy and necessary management of the aforesaid grant of £5000, but without any claim or demand upon any part of the same : as in and by the said deed-poll, reference being thereunto had, will appear ; and the said plaintiff in fact saith, that afterwards, to wit, on the fourth day of November, in the year of our Lord 1843, he, the said plaintiff, attained the age of twenty-one years,

whereof the said Luke Flower, in his lifetime, afterwards, to wit, on the fifth day of November, in the year last aforesaid, had notice; yet neither the said Luke Flower in his lifetime, nor the said defendants, executrix and executor as aforesaid, since his decease, hath or have paid the said sum of £5000, or any part thereof, to the said plaintiff; and on the contrary thereof, after the said plaintiff so became of age, and after the death of the said Luke Flower, to wit, on the fourth day of February, in the year of our Lord 1845, the said sum of £5000, together with a further sum of money, to wit, the sum of £312 10s. for interest thereon, making together the sum of £5312 10s., became, and was, and still is, in arrear, and unpaid to the said plaintiff, contrary to the form and effect of the said deed-poll, whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendants, as executrix and executor as aforesaid, the said sum of £5312 10s. above demanded. Yet the said defendants, executrix and executor, as aforesaid, have not, nor hath either of them (although often requested so to do) paid the said sum of £5312 10s. above demanded, or any part thereof, to the said plaintiff, but have, and each of them hath, hitherto wholly neglected and refused, and still do neglect and refuse so to do, to the damage of the said plaintiff of £1000, and thereupon he brings suit, &c.

2. *Common Count for Goods sold and delivered.*

IN THE COMMON PLEAS.

The 12th day of June, 1845.

Somersetshire, to wit.—Jonathan Gregory (the plaintiff in this suit), by Abraham Elliott, his attorney, complains of James Johnson (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of DEBT—and he demands of the said defendant the sum £500,* which he owes to and unjustly detains from the said plaintiff. For that whereas the said defendant heretofore, to wit, on the first day of December, in the year of our Lord 1844, was indebted to the said plaintiff in

* This is a mere nominal sum. See the note on the next page.

£500, for goods then sold and delivered by the said plaintiff to the said defendant, at his request, *to be paid* by the said defendant to the said plaintiff on request. Whereby, and by reason of the non-payment thereof, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of £500 above demanded. Yet the said defendant, although often requested, hath not paid the said sum of £500, above demanded, or any part thereof, to the damage of the said plaintiff of £50,* and therefore he brings suit, &c.

II.—DETINUE.

For Wine.

IN THE EXCHEQUER OF PLEAS.

The 15th day of June, in the year of our Lord 1845.

Berkshire, to wit.—Anthony Brown (the plaintiff in this suit), by Peter Black his attorney, complains of Augustus White (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of Detinue, *For that whereas* the said plaintiff heretofore and before the commencement of this suit, to wit, on the 12th day of February, in the year of our Lord 1845, had delivered to the said defendant certain goods and chattels, to wit, twenty pipes of wine of the said plaintiff, of great value, to wit of the value of £2000, to be re-delivered by the said defendant to the said plaintiff when the said defendant should be thereunto afterwards requested; yet the said defendant, although he was afterwards, to wit, on the 1st day of March, in the year aforesaid, requested by the said plaintiff so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said plaintiff, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said plaintiff, to the damage of the said plaintiff of £800, and thereupon he brings his suit, &c.

* This is usually a mere nominal sum, called "damages for the detention of the debt:" but as a jury may now, by virtue of stat. 3 & 4 Will 4, c. 42, s. 28, give a verdict for interest, as damages, it is always prudent to name a sum which will be sufficient to cover the amount of interest likely to be recovered.

III.—COVENANT.

By Landlord against Tenant for not repairing according to the Covenant in the Lease [post, p. lxi.—lxiii.]

IV.—ASSUMPSIT.

1. *By a Vendor of Real Property against the Vendee*
[ante, pp. xi.—xiv.]

2. *For a Breach of Promise of Marriage.*

IN THE QUEEN'S BENCH.

The 1st day of June, 1845.

Yorkshire, to wit.—Mary Jones (the plaintiff in this suit), by James White, her attorney, complains of Solomon Swallowfield (the defendant in this suit), who has been summoned to answer the said plaintiff in an action ON PROMISES. For that whereas heretofore, to wit, on the first day of April, in the year of our Lord 1844, in CONSIDERATION that the said plaintiff, being then sole and unmarried, had, at the request of the said defendant, then promised the said defendant to marry him, *when the said plaintiff should be thereunto afterwards requested,** the said defendant then PROMISED the said plaintiff to marry the said plaintiff, when the said defendant should be thereunto afterwards requested. And the said plaintiff AVERS, that confiding in the said promise of the said defendant, she hath always thence hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time aforesaid, and still is, ready and willing to marry the said defendant, whereof he hath always had notice. And ALTHOUGH the said plaintiff, after the making of the said promise of the said defendant, to wit, on the day and year aforesaid, requested the said defendant to marry the said plaintiff, YET the said defendant not regarding his said promise, but contriving and intending to deceive and injure the said plaintiff in this respect, did not nor

* This allegation must, of course, be according to the fact. If the promise was, to marry at a particular day, &c. &c. it must be so stated.

would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the DAMAGE of the said plaintiff of £3000, and therefore she brings her suit, &c.

3. *For Money won at Cribbage.*

IN THE EXCHEQUER OF PLEAS.

The 10th day of June, 1845.

Lincolnshire, to wit.—Thomas Trump (the plaintiff in this suit), by Isaac Tims, his attorney, complains of Simon Spade (the defendant in this suit), who has been summoned to answer the said plaintiff in an action ON PROMISES. For that whereas heretofore, to wit, on the first day of December, in the year of our Lord 1844, in CONSIDERATION that the said plaintiff had, at the request of the said defendant, then agreed with, and promised the said defendant, to play at a certain game, that is to say, at a certain game called cribbage, with the said defendant, and to pay him all such sum and sums of money as the said plaintiff should lose to the said defendant, by means of the said plaintiff's said playing with the said defendant, he, the said defendant, then agreed with, and PROMISED the said plaintiff to play at the said game with the said plaintiff, and to pay the said plaintiff all such sum and sums of money as the said defendant should lose to the said plaintiff, by means of his, the said defendant's, so playing with the said plaintiff, when the said defendant should be thereunto afterwards requested; and the said plaintiff AVERS, that he, confiding in the said promise and agreement of the said defendant, did afterwards, to wit, on the day and year aforesaid, play at the said game with the said defendant, who did also then play at the said game with the said plaintiff; and also the said defendant, by means of his so playing with the said plaintiff as aforesaid, did then lose to the said plaintiff, who did then win of the said defendant, divers sums of money, amounting to a large sum of money, to wit, the sum of £10; YET the said defendant, although he was then and oftentimes afterwards requested by the

said plaintiff to pay him the said sum of money, so by him lost to the said plaintiff in manner aforesaid, did not, nor would, when he was so requested as aforesaid, pay, nor hath he, at any time before or since, hitherto paid, or caused to be paid, the sum of money so by him lost to the said plaintiff as aforesaid, or any part thereof, to the said plaintiff, but hath hitherto wholly refused, and still refuses to do, to the DAMAGE of the said plaintiff of £20, and therefore he brings suit, &c.

4. *Common Court for Goods sold and delivered.*

IN THE QUEEN'S BENCH.

The 12th day of June, 1845.

Somersetshire, to wit,—Jonathan Gregory (the plaintiff in this suit), by Abraham Elliot, his attorney, complains of James Johnson (the defendant in this suit), who has been summoned to answer the said plaintiff in an action *on promises*. For that whereas the said defendant heretofore, to wit, on the 1st day of December, in the year of our Lord 1844, *was* INDEBTED to the said plaintiff in £500* for *goods then sold and delivered* by the said plaintiff to the said defendant, at his request. And whereas the said defendant afterwards in CONSIDERATION of the promises, then PROMISED the said plaintiff to pay him the said sum of money, on request. YET the said defendant hath disregarded his promise, and hath not paid the said money or any part thereof, to the plaintiff's DAMAGE of £500, and thereupon he brings suit, &c.

* This is a mere nominal sum ; and the new Rules of Court now require, in all such cases, that the plaintiff shall, with his declaration, deliver a *particular* of his demand, containing the real sum sought to be recovered ; and by this particular he will be bound at the trial.

II.—ACTIONS—*Ex Delicto*.

1.—TRESPASS.

1.—*For Firing a Loaded Pistol at the Plaintiff, and wounding him.**

IN THE QUEEN'S BENCH.

The 1st day of June, in the year of our Lord 1845.

London, to wit.—William Sadler (the plaintiff in this suit), by Thomas Cain, his attorney, complains of Jacob Stubbs (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of trespass. FOR THAT the defendant heretofore and before the commencement of this suit, to wit, on the first day of February, in the year of our Lord 1845, with force and arms, &c., assaulted the plaintiff, and beat, bruised, wounded, and ill-treated him, and shot off and discharged a pistol, then loaded with gunpowder and leaden bullets, which said pistol, so loaded, he the defendant then held at and against the plaintiff, and thereby and therewith shot, struck, and wounded the plaintiff in so grievous a manner that his life was by means thereof then despaired of, and by reason of such wounding the plaintiff then became lame, sick, and disordered, and continued so lame, sick, and disordered for a long time, to wit, thence hitherto, and was, during all that time, thereby rendered incapable of following and transacting his necessary affairs and business; and also thereby the plaintiff was then forced and obliged to, and did necessarily incur and pay, lay out and expend, a large sum of money, to wit, the sum of £200, in and about endeavouring to be cured of the injuries aforesaid, so occasioned as aforesaid, and other wrongs to the plaintiff then did, against the peace of our Lady the Queen, and to the damage of the plaintiff of £2000, and thereupon he brings suit, &c.

* From 2 Chitt. Plead. 606.—Note. The right of action would be merged in the *felony*, if the defendant shot at the plaintiff *maliciously*.

2.—*For Criminal Conversation with the Plaintiff's Wife.*

IN THE COMMON PLEAS.

The 1st day of June, in the year of our Lord 1845.

Middlesex, to wit.—George Browning (the plaintiff in this suit), by Francis Hawkins, his attorney, complains of Francis Gledall (the defendant in this suit) who has been summoned to answer the said plaintiff in an action of trespass. FOR THAT the defendant heretofore and before the commencement of this suit, to wit, on the twenty-first day of November, in the year of our Lord 1844, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., assaulted and ill-treated Emma, then and still being the wife of the plaintiff, and then debauched and carnally knew her, whereby the plaintiff, for a long space of time, to wit, from the day and year first aforesaid, hitherto hath wholly lost and been deprived of the comfort, fellowship, aid, and assistance of his said wife, in his domestic affairs, which he during all that time ought to have had, and otherwise might and would have had; and other wrongs to the plaintiff then did, against the peace of our Lady the Queen, and to the damage of the plaintiff of £2000, and thereupon he brings suit, &c.

3.—*For Driving a Cart against Plaintiff's Horse.*

IN THE EXCHEQUER OF PLEAS.

The 1st day of June, in the year of our Lord, 1845.

Surrey, to wit.—Horatio Busby (the plaintiff in this suit), by Gideon Grudge, his attorney, complains of Brutus Sheephanks (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of trespass. FOR THAT the defendant heretofore and before the commencement of this suit, to wit, on the 23d day of January, in the year of our Lord 1845, with force and arms, &c., drove a certain cart with great force and violence upon and against a certain horse of the plaintiff, of great value, to wit, of the value of £70, and thereby then, with one of

the shafts and with other parts of the said cart, so pierced, cut, hurt, lacerated, and wounded the said horse of the plaintiff, that by reason thereof the said horse, being of the value aforesaid, afterwards, to wit, on the said 23d day of January, in the year aforesaid, died, and other wrongs to the plaintiff then did, against the peace of our Lady the Queen, and to the damage of the plaintiff of £100, and thereupon he brings suit, &c.

4.—For breaking and entering the Plaintiff's Close, and placing Wood and Rubbish in it.

IN THE QUEEN'S BENCH.

The 1st day of June, in the year of our Lord 1845.

Essex, to wit.—Bruce Campbell (the plaintiff in this suit), by Caleb Court, his attorney, complains of Daniel Calvert (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of trespass. FOR THAT the defendant heretofore and before the commencement of this suit, to wit, on the 24th day of December, in the year of our Lord 1844, with force and arms, &c., broke and entered a certain close, called "The Brambles," situate and being in the parish of Woodford, in the county of Essex, and then put, placed, and laid, and caused and procured to be put, placed, and laid divers large quantities of wood, to wit, ten cart-loads of wood, ten cart-loads of boughs, and ten cart-loads of rubbish, in and upon the said close, and kept and continued the said wood, so there put, placed, and laid, without the leave and license and against the will of the plaintiff, for a long time, to wit, from the respective times of putting, placing, and laying the same as aforesaid, until the commencement of this suit, and thereby and therewith, for and during those respective times, greatly incumbered the said close, and hindered and prevented the plaintiff from having the use, benefit, and enjoyment thereof, and other wrongs to the plaintiff then did, against the peace of our Lady the Queen, and to the damage of the plaintiff of £200, and thereupon he brings suit, &c.

II.—TRESPASS ON THE CASE.

1. *For Criminal Conversation with the Plaintiff's Wife.*

IN THE COMMON PLEAS.

The 15th day of June, in the year of our Lord, 1845.

Northumberland, to wit.—Edwin Mitchell (the plaintiff in this suit), by George Jeffreys, his attorney, complains of David Dixon (the defendant in this suit), who has been summoned to answer the said plaintiff, in an action of TRESPASS ON THE CASE. *For that* WHEREAS the defendant, contriving, and wrongfully, wickedly, and unjustly intending to injure the plaintiff, and deprive him of the comfort, fellowship, society, aid, and assistance of Maria, the wife of the plaintiff, and to alienate and destroy her affection for the plaintiff, heretofore, and before the commencement of this suit, to wit, on the 1st day of January, in the year of our Lord 1845, and on divers other days, between that day and the day of the commencement of this suit, wrongfully, wickedly, and unjustly, debauched and carnally knew the said Maria, then and still being the wife of the plaintiff, and thereby the affection of the said Maria for the plaintiff was then alienated and destroyed, and also by means of the premises, the plaintiff hath thence hitherto wholly lost and been deprived of the comfort, fellowship, society, and assistance of the said Maria, his said wife, in his domestic affairs, which the plaintiff during all that time ought to have had, and otherwise might and would have had, to the damage of the plaintiff of £10,000, and thereupon he brings suit, &c.

2. *For Running Down the Plaintiff's Vessel.*

IN THE EXCHEQUER OF PLEAS.

The 15th day of June, in the year of our Lord, 1845.

Kent, to wit.—Jonathan Monk (the plaintiff in this suit), by Charles Baker, his attorney, complains of William Bramston (the defendant in this suit), who has been summoned to answer the said plaintiff, in an action of trespass on the case. *For that*

did pay, lay out, and expend a large sum of money, to wit, the sum of £60, in and about the endeavouring to be healed and cured of the wounds, lameness, sickness, and disorder so occasioned as aforesaid, to the plaintiff's damage of £200, and thereupon he brings suit, &c.

III.—TROVER.

For a Balloon.

IN THE COMMON PLEAS.

The 1st day of June, in the year of our Lord 1845.

Staffordshire, to wit.—Emanuel Clifton (the plaintiff in this suit), by Titus Trueman, his attorney, complains of William Waller (the defendant in this suit), who has been summoned to answer the plaintiff in an action of trover. For that whereas the plaintiff heretofore, to wit, on the 17th day of January, in the year of our Lord, 1845, was lawfully possessed, as of his own property, of a certain balloon of great value, to wit, of the value of £500, and being so possessed thereof, the plaintiff afterwards, to wit, on the day and year aforesaid, casually lost the same out of his possession, and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the defendant by finding; yet the defendant, well knowing the said balloon to be the property of the plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending to deceive and defraud the plaintiff, hath not as yet delivered the said balloon to the plaintiff (although often requested so to do); and afterwards, to wit, on the day and year aforesaid, converted and disposed of the same to his the defendant's own use, to the damage of the plaintiff of £200, and therefore he brings suit, &c.

IV.—REPLEVIN.

IN THE EXCHEQUER OF PLEAS.

The 21st day of April, in the year of our Lord 1845,
in Easter Term, in the 8th year of the reign of
Queen Victoria.

Sussex, to wit.—Charles Dupper (the defendant in this suit) was summoned to answer Archibald Brudenall (the plaintiff in this suit), of a plea, wherefore he took the cattle of the said plaintiff,

and unjustly detained the same against sureties* and pledges, until, &c. ; and thereupon the said plaintiff, by Henry Blunt, his attorney, complains : FOR THAT the said defendant heretofore, to wit, on the 1st day of February, in the year of our Lord 1845, at Lewes, in the county of Sussex, in a certain place there called † Chalkey Hill, took the cattle, to wit, one gelding, of the said plaintiff, of great value, to wit of the value of £50, and unjustly detained the same, against sureties and pledges, until, &c. : wherefore the said plaintiff saith that he is injured, and hath sustained damage to the value of £100, and therefore he brings his suit, &c.

No. VI.

COURSE OF PLEADING IN AN ACTION AT LAW.

I.—DECLARATION IN COVENANT.

On an Indenture of Lease for not repairing.

IN THE QUEEN'S BENCH.

The 1st day of June, in the year of our Lord 1845.

Middlesex, to wit. A. B. (the plaintiff in this suit), by E. F. his attorney [or, in his own proper person], complains of C. D. (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of covenant : For that whereas heretofore, to wit, on the 10th day of March, in the year of our Lord 1837, by a certain indenture then made between the said plaintiff of the one part and the said defendant of the other part (one part of which

* "Sureties" means here "gages" *per* Holt, C.J., and Treby, C.J., in *Blackett v. Crissop*, 1 Lord Ray, 278. This form of declaring against "Sureties and Pledges" has been preserved to this day, from the old principle that the lord was entitled to keep the distress until the tenant offered gages and pledges ; and if, notwithstanding this offer, the distress were still retained, the tenant was obliged to resort to the Replevin, in which he complained against the lord, for the detention against gages and pledges. *Evans v. Brander*, 2 Wm. Bl. 548.

† See *Pollen v. Bradley*, 2 Moore & P. 78.

said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the day and year aforesaid, the said plaintiff, for the consideration therein mentioned, did demise, lease, set, and to farm let unto the said defendant a certain messuage, or tenement, and other premises, in the said indenture particularly specified, to hold the same, with the appurtenances, to the said defendant, his executors, administrators, and assigns, from the twenty-fifth day of March then next ensuing the date of the said indenture, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at a certain rent payable by the said defendant to the said plaintiff, as in the said indenture is mentioned. And the said defendant, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree, to and with the said plaintiff, his heirs and assigns (amongst other things, that he, the said defendant, his executors, administrators, and assigns, should and would, at all times during the continuance of the said demise, at his and their own cost and charges, support, uphold, maintain, and keep the said messuage, or tenement and premises in good and tenantable repair, order, and condition; and the same messuage, or tenement and premises, and every part thereof, should and would leave in such good repair, order, and condition, at the end, or other sooner determination of the said term, as by the said indenture, reference being thereunto had, will, among other things, fully appear. By virtue of which said indenture, the said defendant afterwards, to wit, on the twenty-fifth day of March, in the year aforesaid, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said plaintiff hath always, from the time of the making of the said indenture, hitherto done, performed, and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet the plaintiff saith, that the said defendant did not, during the continuance of the said demise, support, uphold, maintain, and keep the said messuage, or tenement and premises, in good and tenantable repair, order, and condition, and leave the same in such repair, order, and condition,

at the end of the said term ; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment. And the said defendant left the same, being so ruinous, in decay, and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the said plaintiff saith, that the said defendant (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same ; and to keep the same with the said plaintiff hath hitherto wholly refused, and still refuses, to the damage of the said plaintiff of £50, and therefore he brings his suit, &c.

II.—PLEA IN BAR.

1. *By way of Traverse.*

IN THE QUEEN'S BENCH.

On the 8th day of June, A.D. 1845.

C. D.	}	And the said defendant, by G. H., his attorney [or, in person], says that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay, or out of repair, in manner and form as the said plaintiff hath above complained against him, the said defendant. And of this he puts himself upon the country.
ats.*		
A. B.		

2. *By way of Confession and Avoidance.*

IN THE QUEEN'S BENCH.

On the 8th day of June, A.D. 1845.

C. D.	}	And the said defendant, by G. H., his attorney [or, in person], says that, after the said breach of covenant, and before the commencement of this suit, to wit, on the third day of June, in the year of our Lord 1844, the said plaintiff, by his certain deed of release, sealed with his
ats.		
A. B.		

* "ats."—i. e. "at the suit of."

seal, and now shown to the court here (the date whereof is the day and year last aforesaid), did remise, release, and for ever quit claim to the said defendant, his heirs, executors, and administrators, all damages, cause and causes of action, breaches of covenant, debts and demands whatsoever, which had then accrued to the said plaintiff, or which the said plaintiff then had against the defendant; as by the said deed of release, reference being thereto had, will fully appear. And this the said defendant is ready to verify.

III.—REPLICATION.

By way of Confession and Avoidance.

IN THE QUEEN'S BENCH.

On the 12th day of June, A.D. 1845.

A. B.	}	And the said plaintiff says, that the said plaintiff agst.
C. D.		

of release was unlawfully imprisoned, and detained in prison by the said defendant, until by force and duress of that imprisonment, the said plaintiff made the said supposed deed of release as in the said plea mentioned. And this the said plaintiff is ready to verify.

IV.—REJOINDER.

By way of Traverse.

IN THE QUEEN'S BENCH.

On the 15th day of June, A.D. 1845.

C. D.	}	And the said defendant says, that the said plaintiff freely and voluntarily made the said deed of
A. B.		

release, and not by force and duress of imprisonment, in manner and form as by the said replication alleged. And of this the said defendant puts himself upon the country.

AND the said plaintiff does the like.* Therefore the Sheriff is commanded that he cause to come † here on the first day of

* This is called the "*Similitur*."

† The "*Venire Facias*."

July, in the year of our Lord 1845, twelve good and lawful men of the body of his county, qualified according to law, by whom the truth of the matter may be better known, and who are in no-wise of kin, either to A. B., the plaintiff, or to C. D., the defendant, to make a certain jury of the county between the parties aforesaid, in an action of covenant, because as well the said C. D. as the said A. B., between whom the matter in variance is, have put themselves upon that jury, and have there the names of the jurors, and this writ : Witness, Sir Thomas Denman, &c.

DEMURRER.

*To the Declaration.*1. For matter of *Substance*.

IN THE QUEEN'S BENCH.

The 7th day of June, 1845.

C. D.	}	And the said defendant, by G. H., his attorney, says, that the declaration is not sufficient in law.*
ats.		
A. B.		

2. For matter of *Form*.

The 7th day of June, 1845.

C. D.	}	And the said defendant, by G. H., his attorney, says, that the declaration is not sufficient in law.
ats.		
A. B.		

And the said defendant, according to the form of the statute in such case made and provided, shows to the court here the following causes of demurrer to the said declaration : that is

* The following, which was the form used till that above was given by the new rules, will serve as a specimen of the verbosity and useless circumlocution exhibited by the old system.

" And the said defendant, by G. H., his attorney, comes and defends the wrong and injury when, &c., and saith that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this he is ready to verify—wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having and maintaining his aforesaid action thereof against him," &c.

to say, that no day or time is alleged in the said declaration, at which the said causes of action, or any of them, are supposed to have accrued. And also that the said declaration is in other respects uncertain, informal, and insufficient, &c.

PLEAS IN ABATEMENT.

1. *To the Jurisdiction.*

IN THE QUEEN'S BENCH.

The 7th day of June, 1845.

C. D.	}	And the said defendant, in his proper person.
ats.		says, that the said county of Durham is, and, from
A. B.		time whereof the memory of man is not to the con-

trary, hath been a county palatine; and there now are, and for all the time aforesaid have been justices there; and that all and singular pleas for the recovery of manors, messuages, and tenements, lying and being within the said county, have been for all the time aforesaid, and still are, pleaded and pleadable within the said county of Durham, before the justices there for the time being, and not here in the court of our Lady the Queen, before the Queen herself. And this he is ready to verify. Wherefore, since the plea aforesaid is brought for recovery of the possession of the manors, messuages, lands, and hereditaments aforesaid, within the said county palatine, the said defendant prays judgment if the court of our Lady the Queen here will or ought to have further cognizance of the plea aforesaid.

2. *Alien Plaintiff.*

IN THE QUEEN'S BENCH.

The 7th day of June, 1845.

C. D.	}	And the said defendant, by G. H., his attorney
ats.		[or, in person], says that the said plaintiff ought
A. B.		not to be answered to his declaration aforesaid,

because, he says, that the said plaintiff is an alien born, to wit, at Calais, in the Kingdom of France, in parts beyond the seas under the allegiance of the King of France, an ENEMY of our Lady the now Queen, born of father and mother adhering to the

said enemy ; and that the said plaintiff entered this kingdom without the safe conduct of our said Lady the Queen. And this the said defendant is ready to verify. Wherefore *he prays judgment, if the said plaintiff ought to be answered to his declaration aforesaid.*

3. *Non-joinder of a co-Defendant.*

IN THE QUEEN'S BENCH.

The 7th day of June, 1845.

C. D.	}	And the said defendant, by ———, his attorney
ats.		[or, in person], prays judgment of the said declaration, because he says that the said several
A. B.		supposed promises and undertakings in the said declaration mentioned (if any such were made), were made jointly with one G. H., who is still living, and at the commencement of this suit was and still is resident within the jurisdiction of this court, to wit, at ———, and not by the said defendant alone. And this the said defendant is ready to verify. Wherefore, inasmuch as the said G. H. is not named in the said declaration together with the said defendant, he the said defendant <i>prays judgment</i> of the said declaration, and that the same may be quashed.*

* This plea must always be accompanied by an affidavit, that "the plea is true in substance and in fact," and also of the exact place of residence of the party not joined (stat. 3 & 4 Will. 4, c. 42, s. 8). These stringent but salutary provisions, added to the very limited time allowed for pleading in abatement (four days after the delivery of the declaration, including the first and fourth days) have rendered the use of pleas in abatement very rare.

No. VII.

SPECIMENS OF MODERN CONVEYANCING.*

I.—MARRIAGE SETTLEMENT OF REAL ESTATE.

Settlement on Marriage of Real Estate, (Freehold and Copyhold) upon the Husband and Wife successively for Life, with remainder to the Children of the marriage, as the Husband and Wife, or the Survivor, shall appoint; and in default, in equal Shares in Tail as Tenants in common, with cross Remainders. Powers of Management during Minorities, of Leasing, and of Sale and Exchange.†

THIS DEED, made &c., BETWEEN A. B., of &c. [intended
 Parties. husband], of the first part; C. D., of &c. [intended
 wife], of the second part; and E. F., of &c., and
 Witnesseth. G. H., of &c. [trustees], of the third part, WIT-
 NESSETH, that, in consideration of a marriage intended to be shortly

* From Davidson's Concise Precedents in Conveyancing (1845).

† When real estate is desired to be settled upon the children, as the parents shall appoint, and, in default, equally, the best way is to convey the estate to the trustees upon trust to sell and hold the money produced, upon trusts, to be declared by a settlement of even date. For when real estate is settled as in the Precedent in the text, the ordinary provisions for hotchpot and advancement cannot be applied, nor those for maintenance and accumulation conveniently. And it is evident that the effect of a settlement in trust for sale (such sale, during the lives of the tenants for life, to be with their consent), and a declaration that the rents till a sale shall go as the income of the funds would go, is tantamount to the settlement of the real estate in specie, with the ordinary power of sale. The Precedent in the text, however, is given principally to afford an example of a settlement, in pursuance of the new Act, with the omission of the limitations to the trustees to preserve contingent remainders, and partly, also because a settlement of this kind is sometimes insisted on. And as a settlement among the children equally is almost invariably required for small, and not for large properties, it appeared to be more appropriate in this collection of concise Precedents than a strict settlement, with powers of jointuring and charging portions, and the like. To render these latter settlements really effective and useful, they must necessarily be made of considerable length, and as they generally

solemnised between the said A. B. and C. D., he the said A. B., with the approbation of the said C. D., DOTH HEREBY GRANT AND CONVEY UNTO the said E. F. and G. H., and their heirs, ALL AND SINGULAR the — and hereditaments situate in the parish of —, in the county of —, delineated in the plan drawn in the margin of these presents, and specified in the schedule hereunder written, TOGETHER with all commons, ways, lights, sewers, watercourses, rights, privileges, easements, commodities and appurtenances whatsoever, to the said hereditaments, or any part thereof, belonging or appertaining, or with the same or any part thereof now or heretofore held, used, or enjoyed, or reputed as part or member thereof, or appurtenant thereto,* AND all the estate and interest of the said A. B. and C. D. in and to the said premises, and every part thereof, TO HOLD the said premises UNTO the said E. F. and G. H., and their heirs, TO THE USE of the said A. B. and his heirs, until the said intended marriage: AND after the solemnisation thereof, TO THE USE of the said A. B. and his assigns, during his life, without impeachment of waste; AND after his death, TO THE USE of the said C. D. and her assigns, during her life, without impeachment of waste; AND after the death of the said C. D., TO THE USE of the child, or all or such one or more of the children,

Conveyance.

Parcels.

General words.

Habendum.

To the use of settlor till marriage; after marriage, to uses in favour of the husband, wife, and children;

comprise considerable properties, their bulk is the less material. Doubtless the ordinary *language* of the provisions in great settlements may be considerably abridged; but the tendency of the present day is to multiply the provisions themselves to meet the various new difficulties in the working of them which daily occur. The Precedent in the text may, however, readily be converted into a simple strict settlement, by changing the limitation to the children equally into a limitation to the first and other sons successively in tail, with remainder to the first and other daughters successively; the preceding power of appointment being either omitted or retained. The language of the powers will require to be altered, by restraining their exercise after the death of the tenants for life to the minority of a child entitled under the limitations or appointments.

* These general words should be varied by leaving out "commons," "lights," &c., or the like, which may not be appropriate to the property conveyed, and adding other words (if any) which may be required.

of the said intended marriage, for such estates or estate, and in such manner and form, in every respect, as the said A. B. and C. D. shall, by any deed or deeds, appoint; AND in default of, and until such appointment, and so far as no such appointment shall extend, as the survivor of the said A. B. and C. D. shall, by any deed or deeds, or by will or codicil, appoint; AND in default of, and until such appointment, and so far as no such appointment shall extend, if there shall be only one child of the said intended marriage, TO THE USE of such only child, and the heirs of his or her body; BUT if there shall be more than one child of the said intended marriage, then TO THE USE of all the children of the said intended marriage, and the heirs of their respective bodies, in equal shares, as tenants in common; and if any one or more of the said children shall die without issue, then, as well as to the original share or shares of the child or children so dying as to the share or shares that shall have survived or accrued to such child or children, or to the heirs of his, her, or their body or respective bodies, to the use of the others or other of the said children, and the heirs of their, his, or her respective bodies or body; and, if more than one, in equal shares; AND for default of such issue, TO THE USE of the said A. B., his heirs and assigns, for ever. AND IT IS HEREBY DECLARED, that, after the death of the said A. B. and C. D., so long as any child of the said intended marriage shall be under the age of twenty-one years, the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, shall receive the rents and profits of and manage the said premises; with power to fell timber for repairs, or sale, or otherwise, and to accept surrenders from, and make allowances to, and arrangements with, tenants and others, and with all other powers expedient for the due management thereof; and after deducting the expenses of management, repairs, insurance, and other outgoings [*if there be any charge on the premises, add, "and keeping down any annual sum or sums, and the interest on any principal sum or sums charged on the premises"*], shall pay, to such of the children of the said intended marriage as shall for

and for default
of issue to the
husband in fee.

Provision for the
application of
the rents and
profits during
the minorities
of the children.

the time being have attained the age of twenty-one years, his, her, or their share or respective shares of the said net rents and profits; and shall, out of the share thereof of every or any of the said children who shall for the time being be under the age of twenty-one years, pay the whole, or such sum or sums as the said trustees or trustee shall think proper, for or towards the maintenance or education of every such minor (either directly, or to his or her guardian or guardians, to be applied by such guardian or guardians, without accounting to the said trustees or trustee), and shall accumulate the residue (if any) of every or any such share of the said rents and profits, in the way of compound interest, by investing the same, and all the resulting income thereof, in their or his names or name, in or upon any of the public stocks or funds of Great Britain, or upon government or real securities in England, Wales, or Ireland, with power to resort to such accumulations respectively at any time or times during the minority of the child from whose share the same respectively shall have arisen, for the maintenance or education of such child; and, subject and without prejudice to the provision for resorting to the said accumulations for maintenance and education as aforesaid, shall hold all the said residue of every or any such share of the said rents and profits, and the stocks, funds, and securities in or upon which the same may be invested, upon such trusts as the same would be held upon if the same were moneys arising from sales under the power of sale hereinafter contained, or stocks, funds, or securities purchased therewith: PROVIDED ALWAYS, that it shall be lawful for the said

A. B. during his life, and, after his death, for the said C. D. during her life, and after the death of the said A. B. and C. D., for the said E. F. and G. H., and the survivor of them, and the executors or administrators of such survivor, during the minority of any child of the said intended marriage, at any time or times, to appoint, by way of lease, all or any of the said hereditaments and premises for any term of years absolute, not exceeding twenty-one years, to take effect in possession, so as there be reserved thereon the best yearly rent or rents to be incident to the immediate reversion that can be reasonably

Power of
leasing.

gotten, without taking any fine, premium, or foregift, or anything in the nature thereof, and so as there be contained in every such appointment a condition of re-entry for non-payment, within a reasonable time to be therein specified, of the rent or rents thereby reserved, and so as the appointee or appointees do execute a counterpart thereof, and be not made dispunishable for waste : *
 PROVIDED ALSO, that it shall be lawful for the said E. F. and

Power of sale
and exchange.

G. H., and the survivor of them, and the executors or administrators of such survivor, (hereinafter called the trustees or trustee), at any time or times during the life of the said A. B., with his consent in writing, and, after his death, during the life of the said C. D., with her consent in writing, and, after the death of the said A. B. and C. D., during the minority of any child of the said intended marriage, at the discretion of them the said trustees or trustee (but subject to any lease which may have been granted under the power hereinbefore contained), to dispose of, either by way of sale, or in exchange for other hereditaments in England or Wales, all or any of the said hereditaments and premises upon such terms and under such conditions as the said trustees or trustee shall think fit, with power to buy in or rescind any contract for sale or exchange of all or any of the said premises, and to re-sell or exchange the same without being responsible for any loss which may be occasioned thereby, and to revoke the uses, trusts, and powers then subsisting in or of the hereditaments so sold or disposed of in exchange, and appoint the same to such uses and in such manner as shall be expedient to effect such sale or exchange. AND IT IS HEREBY DECLARED, that the said trustees or trustee shall, with such consent, or at such discretion as aforesaid, lay out the money received upon any sale, or for equality of exchange,†

Moneys arising
under the power
of sale and
exchange to be
laid out in the

* The above is the ordinary power to lease for twenty-one years either houses or lands. But if the property contains stone or minerals, there should be a power to grant mining leases ; and if it comprise land likely to be required for building, or houses likely to require repairs, there should be a power to grant leases for building and repairing purposes. (See the forms of such powers, 5 Martin's Conveyancing, pp. 218—221).

† It is usual to provide that the trustees of the power of sale and exchange

in the purchase of freehold or copyhold hereditaments of inheritance * in England or Wales, and shall settle or cause the same to be settled to the uses, upon the trusts, and subject to the powers hereby limited, as far as the deaths of parties and other intervening circumstances will permit. AND IT IS HEREBY FURTHER DECLARED, that, until the money to be received upon any sale, or for equality of exchange, shall be laid out as aforesaid, the said trustees or trustee may, with such consent or at such discretion as aforesaid, invest the same in their or his names or name, in any of the public stocks or funds of Great Britain, or upon Government or real securities in England, Wales, or Ireland, and vary the same, if and as they or he shall think fit. AND that the annual income from such stocks, funds, and securities shall be paid and applied to such person or persons, for such purposes, and in such manner as the rents and profits of the hereditaments to be purchased therewith as aforesaid would be payable or applicable, in case such purchase and settlement as aforesaid were then actually made.† AND THESE PRESENTS ALSO WIT- Witness.

purchase of
lands, to be
settled to the
uses of the
settlement;

and, till a purchase, to be
invested in the
funds or upon
securities.

may pay or receive money for equality of exchange ; but, as the power so to pay or receive is incident to the power of exchange, (*Bartram v. Whickcote*, 6 Sim. 86), the provision is unnecessary. Money to be so paid by the trustees, may be paid by them out of any moneys received by them under their power (*Ib.*) ; but a power is often added (where conciseness is not an object) to enable them to raise money for the purpose by mortgage.

• It is convenient to extend the power of purchase to copyholds for lives, and leaseholds for lives and years ; but, as this requires considerable additional trust for renewal and settlement, it is better omitted when brevity is desired.

† It must be understood that the above power of sale and exchange is applicable only to small estates, and to simple settlements. If the estate is, or under powers of charging may become, subject to incumbrances, there must be provisions for allowing money arising from sales to be applied in discharge of incumbrances. There must also be provisions for purchasing and selling lands of all tenures, and a provision that the power shall overreach all charges to be created under the powers or terms of years, except sales or mortgages actually made. (See the form of a complete power, 5 Martin's Conveyancing, pp. 226—233.

NESS that, for the consideration aforesaid, he the said A. B., with the approbation of the said C. D., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F. and G. H., and their heirs, that, in case the said intended marriage shall be solemnised, he the said A. B., or his heirs, will, at the next or some subsequent court holden for the manor of —, in the county of —, at his or their own cost, surrender into the hands of the lord of the same manor, according to the custom thereof, ALL AND SINGULAR the — and hereditaments situate in the parish of —, in the county of —, delineated in the plan drawn in the margin of these presents, and specified in the schedule hereunder written, TOGETHER with all commons, ways, lights, sewers, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever, to the said hereditaments, or any part thereof, belonging or appertaining, or with the same or any part thereof now or heretofore held, used, or enjoyed, or reputed as part or member thereof, or appurtenant thereto,* AND all the estate and interest of the said A. B. and C. D. in and to the said premises, and every part thereof, TO HAVE AND TO HOLD the said premises hereby conveyed, or expressed and intended so to be, UNTO the said C. D., his heirs and assigns, their heirs and assigns, TO THE USE of the said E. F. and G. H., their heirs and assigns, according to the custom of the same manor, by and under the accustomed rents, fines, suits, and services, and upon such trusts, and subject to such powers, as shall as nearly correspond with the uses, trusts, and powers hereinbefore limited and contained of the said premises hereinbefore conveyed, as the different qualities of the estates and the rules of law and equity will permit. AND IT IS HEREBY DECLARED, that, if the said trustees hereby appointed, or any of them, or any trustee or trustees to be appointed as hereinafter is mentioned, shall die, or be desirous of being discharged, or refuse or become incapable to act, then and so often the said

Covenant to
surrender copy-
holds.

Parcels.

General words.

To the use of
the trustees,
upon trusts to
correspond with
the uses of the
freeholds.

Power to
appoint new
trustees.

* See note, p. lxix.

A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, may appoint any other person or persons to be a trustee or trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act. AND, upon every such appointment, the said trust premises shall be so transferred that the same may become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case may require; and every such new trustee shall (either before or after the said trust premises shall have become so vested) have the same power, authorities, and discretion as if he or they had been hereby originally appointed a trustee or trustees. AND IT IS HEREBY DECLARED, that the trustees or trustee for the time being of these presents shall be chargeable only with such moneys as they or he respectively shall actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker, or other person in whose hands any of the trust moneys shall be placed, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor otherwise for involuntary losses; AND that the said trustees or trustee for the time being may reimburse themselves or himself, out of the moneys which shall come to their or his hands under the trusts aforesaid, all expenses to be incurred in or about the execution of the aforesaid trusts. AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. F. and G. H., their heirs and assigns, that, notwithstanding any act, deed, or thing by him the said A. B., or any of his ancestors, made or done, or knowingly suffered, he the said A. B. now hath power to convey and settle the said premises hereinbefore conveyed to the uses and in manner aforesaid, free from incumbrances, and to surrender the said premises hereinbefore covenanted to be surrendered to the use of the said E. F. and G. H., their heirs and assigns, upon the trusts and in manner aforesaid, free from incumbrances; AND that he the said A. B., and his heirs, and all persons lawfully or equitably claiming any estate or interest in the

Trustees' indemnity clause.

Covenants for right to convey and surrender free from incumbrances;

premises through or in trust for him or any of his ancestors,
 will, at all times, at the request of the said
 and for further trustees or trustee, or any person interested in the
 assurance. premises, and at the cost of the trust estate,
 make, do, acknowledge, and execute all such acts, deeds,
 conveyances, surrenders, and assurances for further and better
 conveying and assuring the said premises respectively to the
 several uses and in manner aforesaid, as by the said trustees
 or trustee, or any person interested in the premises, shall be
 reasonably required. IN WITNESS, &c.

II.—SETTLEMENT, ON MARRIAGE, OF A SUM OF STOCK.

THIS DEED, made &c., BETWEEN A. B., of &c. [*intended hus-*
band], of the first part; C. D., of &c. [*intended*
 Parties. *wife*], of the second part; and E. F., of &c.,
 G. H., of &c., and I. K., of &c. [*trustees*], of the third part,
 WITNESSETH, that, in consideration of a marriage
 Witnesseth. intended to be shortly solemnised between the
 said A. B. and C. D., IT IS HEREBY AGREED AND DECLARED, that
 the said E. F., G. H., and I. K., their executors,
 Declaration of administrators, and assigns, shall hold the sum of
 trust: £———, £——— per Cent. ——— Bank An-
 nuities, belonging to the said C. D., and lately transferred by her
 into the names of the said E. F., G. H., and I. K., and the
 —for the wife dividends thereof, IN TRUST for the said C. D.,
 till the marriage. until the said intended marriage; AND, after the
 Power to vary solemnisation thereof, UPON TRUST that the said
 investments. E. F., G. H., and I. K., or the survivors or survi-
 vor of them, or the executors or administrators of such survivor
 (hereinafter called the trustees or trustee), shall either permit
 the said sum of Bank Annuities, or any part thereof, to remain
 unaltered, or shall, with the consent in writing of the said A. B.
 and C. D. during their joint lives, and of the survivor of them
 during his or her life, and, after the death of such survivor,
 at the discretion of them the said trustees or trustee, sell

the same, or any part thereof, and lay out the moneys produced by such sale, in their or his names or name, in any of the public stocks or funds of Great Britain, or upon Government or real securities in England, Wales, or Ireland [or in the shares, stock, or securities of any company incorporated by act of Parliament, and paying a dividend], and shall, with such consent, or at such discretion as aforesaid, vary the said investments if and as they or he shall think fit, AND SHALL PAY the annual income of the said Bank Annuities, moneys, stocks, funds, and securities, during the joint lives of the said A. B. and C. D., to the said C. D. for her separate use, independently of the said A. B., so that her receipts alone shall be sufficient discharges, and that she shall not have power to deprive herself thereof in anticipation; AND, after the death of either of them the said A. B. and C. D., to the survivor of them during his or her life; AND, after the death of the survivor, shall hold the said premises, and the annual income thereof, IN TRUST for the child, or for all or any such one or more of the children, of the said intended marriage, in such manner and form in every respect as the said A. B. and C. D. shall by any deed or deeds jointly appoint; AND, in default of such appointment, and so far as no such appointment shall extend, as the survivor of the said A. B. and C. D. shall, by any deed or deeds, or by will or codicil, appoint; AND, in default of any such appointment, and so far as no such appointment shall extend, IN TRUST for all the children, or any the child, of the said intended marriage, who, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or marry, and, if more than one, in equal shares: PROVIDED ALWAYS, that no child taking any part of the said premises under any such appointment as aforesaid shall be entitled to any share of that part of the said premises of which no such appointment shall be made, without bringing his or her appointed share into hotchpot: PROVIDED ALSO, that the said trustees

Trust for wife's separate use, for the joint lives;

—for survivor for life;
—for children of the marriage, as husband and wife shall jointly appoint;

in default, as survivor shall appoint;

in default, equally.

Hotchpot clause.

or trustee may, after the decease of the survivor of the said A. B. and C. D., or in the lifetime of them, or the survivor of them, if they, he, or she shall so direct in writing, raise any part or parts of the then expectant, presumptive, or vested share or fortune of any child under the trusts hereinbefore declared, not exceeding in the whole for any such child one half part of his or her then expectant, presumptive, or vested share or fortune, and apply the same for his or her advancement or benefit. AND IT IS HEREBY DECLARED, that the said trustees or trustee shall, after the decease of the survivor of the said A. B. and C. D., apply the whole, or such part as the said trustees or trustee shall think fit, of the annual income of the share or fortune to which any child shall, for the time being, be entitled in expectancy under the the trusts hereinbefore declared, for or towards the maintenance or education of such child, either directly or to his or her guardians or guardian, without seeing to the application thereof, or requiring any account of the same; AND shall, during such suspension of absolute vesting, accumulate the residue (if any) thereof in the way of compound interest, by investing the same, and the resulting income thereof, from time to time, in or upon any such stocks, funds, shares, or securities as are hereinbefore mentioned for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee to resort to the accumulations of any preceding year or years, and apply the same for or towards the maintenance or education of the child or children who shall for the time being be presumptively entitled to the same respectively. AND IT IS HEREBY DECLARED, that, if there shall be no child of the said intended marriage, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then (without prejudice to the trusts hereinbefore declared) the said trustees or trustee shall hold the said trust

Power of
advancement.

Maintenance
and education.

Accumulation
clause.

Disposition in
default of child-
ren entitled
under the pre-
ceding trusts.

premises, and the annual income thereof, or so much thereof respectively as shall not have become vested or been applied under any of the trusts or powers herein contained, upon the trusts following; (that is to say), if the said C. D. shall survive the said A. B., then, after his death and such default, or failure of children as aforesaid, IN TRUST for the said C. D.; BUT, if the said C. D. shall die in the lifetime of the said A. B., then, after his death and such default, or failure of children as aforesaid, UPON AND FOR SUCH TRUSTS, intents, and purposes as the said C. D. shall, notwithstanding coverture, by will or codicil, appoint; AND, in default of such appointment, and so far as no such appointment shall extend, IN TRUST for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the said C. D., if she had died possessed thereof intestate, and without having been married, such persons, if more than one, to take as tenants in common, in the shares to which they would have been entitled under the same statutes. AND IT IS HEREBY DE-

Power to
appoint new
trustees.

CLARED, that, if the said trustees hereby appointed, or any of them, or any trustee or trustees to be appointed as hereinafter is mentioned, shall die, or be desirous of being discharged, or refuse or become incapable to act, then and so often the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, may appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act; AND, upon every such appointment, the said trust premises shall be so transferred that the same may become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case may require; and every such new trustee shall (either before or after the said trust premises shall have become so vested) have the same power, authorities, and discretion as if he or they had been hereby originally appointed a trustee or trustees. AND IT IS HEREBY DECLARED,

Trustees'
indemnity
clause.

that the trustees or trustee for the time being of these presents shall be chargeable only with such moneys as they or he respectively shall actually receive, and shall

not be answerable the one for the other of them, nor for any banker, broker, or other person in whose hands any of the trust moneys shall be placed, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor otherwise for involuntary losses ; AND that the said trustees or trustee for the time being may reimburse themselves or himself, out of the moneys which shall come to their or his hands under the trusts aforesaid, all expenses to be incurred in or about the execution of the aforesaid trusts. IN WITNESS, &c.

III.—WILL OF REAL AND PERSONAL ESTATE, FOR THE BENEFIT
OF THE TESTATOR'S WIFE AND CHILDREN.

I, A. B., of &c., DECLARE this to be my last will and testament.

<p>Gift to wife of household goods and furniture,</p> <p>and of a pecuniary legacy.</p> <p>General devise of real estate,</p> <p>in trust for sale.</p>	<p>I BEQUEATH to my wife, C. B., all the pictures, prints, books, plate, linen, china, wines, liquors, provisions, household goods, furniture, horses, carriages, chattels, and effects (other than money, or securities for money), which shall at my death be in or about my dwelling-house, or the outbuildings or grounds thereof. I BEQUEATH to my said wife the sum of £——, to be paid to her within one calendar month after my death, without interest. I DEVISE all my real estate (except what I otherwise devise by this my will, and except estates vested in me upon trust) unto E. F., of &c., G. H., of &c., and I. K., of &c., their heirs, executors, and administrators respectively, according to the nature and tenure thereof, UPON TRUST, that the said E. F., G. H., and I. K., and the survivors and survivor of them, and the heirs, executors, and administrators respectively of such survivor, shall, as soon as conveniently may be, sell the same, either together or in parcels, and either by public auction or private contract, with full power to buy in or rescind any contract for sale of the said real estate, or any part thereof, and to re-sell the same, without being responsible for any loss which may be occasioned thereby, and to make, do, and execute all such acts, deeds, and assurances for effectuating any such sale as they or he</p>
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shall think fit. I BEQUEATH all my personal estate (except chattels real, included in the general devise hereinafore contained of real estate, and except what I otherwise bequeath by this my will) unto the said E. F., G. H., and I. K., their executors and administrators, UPON TRUST, that the said E. F., G. H., and I. K., and the survivors and survivor of them, and the executors or administrators of such survivor, shall, as soon as conveniently may be, call in, sell, and convert into money such part of my said personal estate as shall not consist of money. AND I DECLARE, that the said E. F., G. H., and I. K., and the survivors and survivor of them, and the heirs, executors, and administrators respectively of such survivor, shall, by and out of the moneys to arise from the sale of my said real estate, and from the calling in, sale, and conversion into money of such part of my said personal estate as shall not consist of money, and the money of which I shall be possessed at my death, PAY my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will, or any codicil hereto ; AND shall invest the residue of the said moneys in the names or name of the said E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor (hereinafter called the trustees or trustee), in any of the public stocks or funds of Great Britain, or upon Government or real securities in England, Wales, or Ireland [or in or upon the shares, stock, or securities of any company incorporated by act of Parliament, and paying a dividend], with power for the said trustees or trustee to vary the said stocks, funds, shares, and securities, at their or his discretion. AND I DECLARE, that the said E. F., G. H., and I. K., and the survivors and survivor of them, and the executors and administrators of such survivor, shall PAY the annual income of the said trust funds to my said wife so long as she shall continue my widow ; AND after her death or

General bequest
of personality,

in trust for sale
and conversion
into money.

Declaration of
the trusts of the
money produced
by the real and
personal estate ;

to pay funeral
and testamentary
expenses,
debts, and
legacies,
and to invest
the residue,

with power to
vary the invest-
ments.

In trust to pay
the income to
testator's wife
for life or
widowhood ;

marriage, shall hold the said moneys, stocks, funds, and securities, and the annual income thereof, UPON TRUST, for all or any such one or more of my children, and in such manner and form in every respect as my said wife shall, so long as she shall remain unmarried, by any deed or deeds, or by will or codicil, appoint; AND in default of any such appointment, and so far as no such appointment shall extend, IN TRUST for all my children, or any my child, who, being sons or a son, shall attain twenty-one years, or being daughters or a daughter, shall attain that age or marry, and, if more than one, in equal shares: PROVIDED ALWAYS, that no child taking any part of the said premises under any such appointment as aforesaid shall be entitled to any share of that part of the said premises of which no such appointment shall be made, without bringing him or her appointed share into hotchpot: PROVIDED ALSO, that the said trustees or trustee may, after the death or marriage of my said wife, which shall first happen, or previously thereto if she shall so direct in writing, raise any part or parts of the then expectant, presumptive, or vested share or fortune of any child under the trusts hereinbefore declared, not exceeding in the whole for any such child one half part of his or her then expectant, presumptive, or vested share or fortune, and apply the same for his or her advancement or benefit.

and afterwards to hold the funds in trust for testator's children, as his wife shall appoint; and in default of appointment, in trust for all testator's children, who, being sons, attain twenty-one, or, being daughters, attain that age or marry.

Hotchpot clause.

Advancement clause.

Maintenance clause.

AND I HEREBY DECLARE, that the said trustees or trustee shall, after the death or second marriage of my wife, which shall first happen, apply the whole, or such part as they or he shall think fit, of the annual income of the share or fortune to which any child shall, for the time being, be entitled under the trusts hereinbefore declared, for or towards the maintenance or education of such child, either directly, or to his or her guardians or guardian, without seeing to the application thereof, or requiring any account of the same; *

* The last part of this provision is, of course, inapplicable when the trustees are appointed guardians.

AND shall, during such suspense of absolute vesting, accumulate the residue (if any) thereof in the way of compound interest, by investing the same, and the resulting income thereof, from time to time, in or upon any such stocks, funds, shares, or securities as are hereinbefore mentioned, for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee to resort to the accumulation of any preceding year or years, and apply the same for or towards the maintenance or education of the child or children who shall, for the time being, be presumptively entitled to the same respectively; AND if there shall be no child of mine living at my death, who, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry, then from and after the death or marriage of my said wife, and such default or failure of children, I BEQUEATH the said moneys, stocks, funds, shares, and securities, or so much thereof as shall not have become vested or been applied under the trusts aforesaid, unto, &c.* AND I HEREBY DECLARE, that it shall be lawful for the said trustees or trustee, at any time or times before all my said real estate shall have been sold, to demise all or any of the said real estate for any term of years absolute, not exceeding twenty-one years, to take effect in possession, so as there be reserved on every such demise the best yearly rent or rents to be incident to the immediate reversion that can be reasonably gotten, without taking any fine, premium, or foregift, or anything in the nature thereof, and so as there be contained in every such demise a condition of re-entry for non-payment within a reasonable time, to be therein specified, of the rent or rents thereby reserved, and so as the lessee or lessees do execute a counterpart thereof, and be not made punishable for waste. AND I FURTHER DECLARE, that until all my said real and personal estate shall be sold and

Accumulation
clause.

Disposition in
default of children
entitled
under the pre-
ceding trusts.

Power of leasing
for twenty-one
years.

* If the testator's children are numerous, the bequest in default of children will probably be omitted.

converted into money, the said trustees or trustee shall apply the income of such part thereof as shall, for the time being, remain unsold, or unconverted, after payment thereof of all rates, taxes, expenses of repairs, insurance, and other outgoings, to the person or persons, for the purposes, and in the manner, to whom, and for, and in which the annual income of the stocks, funds, shares, or securities aforesaid would be payable and applicable if such real and personal estate had then been sold, and the net surplus moneys arising from such sale had been invested as aforesaid. I DEVISE all the freehold and copyhold hereditaments vested in me upon mortgage unto the said E. F., G. H., and I. K., their heirs and assigns, subject to the equity of redemption subsisting therein respectively, but the money secured on such mortgages shall be considered as part of my personal estate.* I APPOINT my said wife, and the said E. F., G. H., and I. K. guardians of my infant children. AND I APPOINT the said E. F., G. H., and I. K., executors of this my will, and authorise the acting executors or executor, for the time being, of this my will, to satisfy any debts claimed to be owing by me or my estate, and any liabilities to which I or my estate may be alleged to be subject, upon any evidence they or he shall think proper, and to accept any composition or security for any debt, and to allow such time for payment (either with or without taking security) as to the said acting executors or executor shall seem fit, and also to compromise, or submit to arbitration, and settle all accounts and matters belonging or relating to my estate, and, generally, to act in regard thereto as they or he shall think expedient, without

* It has been generally considered of late that trust estates ought not to be devised, as they often are. (See 5 Martin's Conveyancing, 13.) If so, they must of course be excepted from the general devise of real estate. See, however, *Midland Counties Railway v. Westcomb*, 11 Sim. 57. It is unnecessary to include leaseholds or terms of years in the dispositions in the text, as they vest in the executors.

being responsible for any loss thereby occasioned. AND I HEREBY
 DECLARE, that, if the said trustees hereby ap-
 pointed, or any of them, or any trustee or trustees
 to be appointed as hereinafter is provided, shall
 die, or be desirous of being discharged, or refuse or become
 incapable to act, then and so often the said trustees or trustee
 (and, for this purpose, any retiring trustee shall be considered
 a trustee) may appoint any other person or persons to be a trustee
 or trustees in the place of the trustee or trustees so dying, or
 desiring to be discharged, or refusing or becoming incapable to
 act; AND upon every such appointment the said trust premises
 shall be so transferred, that the same may become vested in the
 new trustee or trustees jointly with the surviving or continuing
 trustee or trustees, or solely, as the case may require, and every
 such new trustee shall (both before and after the said trust
 premises shall have become so vested) have the same powers,
 authorities, and discretions as if he had been hereby originally
 appointed a trustee. AND I DECLARE, that the
 trustees or trustee for the time being of this my
 will, shall be chargeable only with such moneys as
 they or he respectively shall actually receive, and shall not be
 answerable the one for the other of them, nor for any banker,
 broker, or other person in whose hands any of the trust moneys
 shall be placed, nor for the insufficiency or deficiency of any
 stocks, funds, shares, or securities, nor otherwise for involuntary
 losses; AND that the said trustees or trustee for
 the time being may reimburse themselves or him-
 self, out of the moneys which shall come to their or
 his hands under the trusts aforesaid, all expenses
 to be incurred in or about the execution of the aforesaid trusts.
 IN WITNESS, &c.

Power to
 appoint new
 trustees.

Trustees'
 indemnity
 clause.

Power to re-
 imburse them-
 selves their
 expenses.

IV.—DEED BY TENANT IN TAIL, WITH THE CONSENT OF THE PROTECTOR, TO BAR AN ENTAIL OF FREEHOLDS.

THIS DEED, made, &c., BETWEEN C. B. [*tenant in tail*], of the first part ; A. B., of &c. [*protector*], of the second part ; and E. F., of &c., [*grantee to uses*], of the third part. WHEREAS, by an indenture bearing date the — day of —, and made, or expressed to be made, between [*parties*] certain manors, messuages, lands, and hereditaments in the parishes of — and —, in the county of —, in the said indenture described or referred to, were limited to certain uses, which have now failed or determined, and, after the failure or determination thereof, to the use of the said A. B., and his assigns, during his life, without impeachment of waste ; with remainder, to the use of certain persons and their heirs, during the life of the said A. B., in trust for him and his assigns, and to preserve the contingent remainders ; with remainder, to the use of the first and other sons of the body of the said A. B. successively, according to their respective seniorities, in tail ; with remainders over. AND WHEREAS some of the hereditaments comprised in the aforesaid indenture have been sold and given in exchange under a power in that behalf therein contained, and other hereditaments have been taken in exchange and purchased under the same power, and have been limited to the uses of the said indenture, by reference thereto, and certain lands have been allotted, by an award under an inclosure act, in respect of lands comprised in the said indenture, or settled by reference thereto. AND WHEREAS the said C. B. is the first son of the body of the said A. B., and has attained his age of twenty-one years, and is desirous of barring the estate tail, and every other estate tail (if any) of him the said C. B. in the aforesaid manors, messuages, lands, and hereditaments, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination, or

Parties.

Recital of creation of the entail ;

—of changes in the estates ;

—of the birth and majority of the tenant in tail, and the desire to bar the entail ;

in defeasance of the said estate tail, and of every other estate tail (if any) of him the said A. B. in the said premises, and of limiting the same premises to the use of him, his heirs and assigns. AND WHEREAS the said A. B., as protector of the said settlement, has consented thereto, NOW THESE PRESENTS WITNESS, that, for effectuating the said desire, he, the said C. B., with the consent of the said A. B., doth hereby grant and convey unto the said E. F., and his heirs, ALL AND SINGULAR the said manors, messuages, lands, and hereditaments, by the said indenture, or by reference thereto, limited as aforesaid, or which, under the said award or otherwise howsoever, are now subject to the subsisting uses thereof, TOGETHER with all commons, ways, lights, sewers, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever, to the said hereditaments, or any part thereof, belonging or appertaining, or with the same or any part thereof now or heretofore held, used, or enjoyed, or reputed as part or member thereof, or appurtenant thereto, AND all the estate and interest of the said C. B. in and to the said premises, and every part thereof, EXCEPT such of the said hereditaments comprised in the said indenture as have been sold or given in exchange, TO HOLD the said premises (except as aforesaid, and subject and without prejudice to the said estate for life of the said A. B., and to such of the powers and privileges thereto annexed, or exerciseable during the continuance thereof, as are now subsisting or capable of being exercised) UNTO the said E. F., and his heirs, TO THE USE of the said C. B., his heirs and assigns. IN WITNESS, &c.

—of the consent
of the protector.

Witness.

Conveyance to
a releasee.

Parcels.

General words.

Habendum.

No. VIII.

CROWN AND CRIMINAL PROCEEDINGS.

INDICTMENT—CRIMINAL INFORMATION—EX OFFICIO INFORMATION—
 QUO WARRANTO INFORMATION—CERTIORARI—PROCEDENDO—
 MANDAMUS.

INDICTMENT—FOR HIGH TREASON.

Middlesex, to wit.—The Jurors of our Lady the Queen [*i. e.* the Grand Jurors] upon their oath present that Smirk Muddflint, late of the Parish of Saint Martin-in-the-Fields, in the County of Middlesex, labourer, a subject of our said Lady the Queen then and there being, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said Lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience, which every true and faithful subject of our said Lady the Queen should, and of right ought, to bear towards our said Lady the Queen, on the first day of May, in the eighth year of the reign of our Sovereign Lady Victoria, and on divers other days, as well before as after, with force and arms, at the Parish aforesaid, in the County aforesaid, maliciously and traitorously, together with divers other false traitors, to the jurors aforesaid unknown, did compass, imagine, devise, and intend to depose our said Lady the Queen from the royal state, title, power, and government of this realm, and from the style, honour, and kingly name of the imperial crown thereof, and to bring and put our said Lady the Queen to death: and the said treasonable compassing, imagination, device, and intention, then and there, maliciously and traitorously did express, utter, declare, and evince, by divers overt acts and deeds, hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT, his most evil and wicked treason and treasonable compassing, imagination, device,

and intention aforesaid, he the said Smirk Mudflint, as such false traitor as aforesaid, afterwards, to wit, on the said first day of May, in the year aforesaid, and on divers other days, as well before as after, with force and arms, at the Parish aforesaid, in the County aforesaid, maliciously and traitorously did conspire, consult, consent, and agree with one Samuel Repton, and divers other false traitors, to the jurors aforesaid unknown, to raise, levy, and make insurrection, rebellion, and war, within this kingdom, against our said Lady the Queen ; AND FURTHER, FULFIL, PERFECT, AND BRING TO EFFECT, his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said Smirk Mudflint, as such false traitor as aforesaid, afterwards, to wit, [*&c., &c., so proceeding to state other overt acts in the same manner ; and then concludes thus*] : in contempt of our said Lady the Queen, and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said Smirk Mudflint, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

INFORMATIONS.

I.—CRIMINAL INFORMATION (by the Queen's Coroner and Attorney)
FOR SENDING A CHALLENGE TO FIGHT.

Easter Term, in the eighth year of the reign of Queen Victoria.

Essex, to wit.—Be it remembered, that Charles Francis Robinson, Esq., Coroner and Attorney of our Lady the now Queen, in the Court of our Lady the Queen, before the Queen herself, who prosecutes for our Lady the Queen in this behalf, in his proper person, comes here into the said Court of our said Lady the Queen, before the Queen herself, at Westminster, on —, after —, in this same term, and for our said Lady the Queen ; gives the Court here to understand, and be informed, that Jacob Newman, late of the Parish of Epping, in the County of Essex aforesaid, gentleman, being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending, not only to vex, injure,

and disquiet one John Soames, and to do the said John Soames some grievous bodily harm, but also to provoke, instigate, and excite the said John Soames to break the peace, and to fight a duel with and against him, the said Jacob Newman, on the first day of April, in the eighth year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him, the said John Soames, a certain letter, and paper writing, directed by him, the said Jacob Newman, containing a challenge to fight a duel, with and against him, the said John Soames, and which said letter and paper writing is as follows, that is to say [*here set out the letter with such innuendos as may be necessary*] to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our Lady the Queen, her crown and dignity. (*Second Count*) And the said Coroner and Attorney of our Lady the Queen, who prosecutes as aforesaid, further gives the Court here to understand, and be informed, that the said Jacob Newman, contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously, did provoke, instigate, excite, and challenge the said John Soames to fight a duel, with and against him, the said Jacob Newman, to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity. And, therefore, the said Coroner and Attorney of our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Jacob Newman in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.*

* Archbold's Practice of the Crown Office, p. 41., edit. 1844.

II.—EX-OFFICIO INFORMATION BY THE ATTORNEY GENERAL.

Easter Term, in the eighth year of the reign of Queen Victoria.

Middlesex, to wit.—Be it remembered, that Sir William Follett, Knight, Attorney General of our Lady the now Queen, who prosecutes for our said Lady the Queen in this behalf, in his proper person, comes here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the fifteenth day of April, in this same term, and for our said Lady the Queen, gives the Court here to understand and be informed, that, &c. [*here state the subject-matter of the information*]. And, therefore, the said Attorney General of our said Lady the Queen, prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said George Grange, in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.

III.—QUO WARRANTO INFORMATION.

Of Trinity Term, in the eighth year of the reign of Queen Victoria.

Lancashire, to wit.—Be it remembered, that Charles Francis Robinson, Esquire, Coroner and Attorney of our Lady the Queen, in the Court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen in this behalf, in his own proper person, cometh here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the 26th day of May, in the same term, and for our said Lady the Queen, at the relation of James Strutt, of the Borough of Bolton, in the County of Lancaster aforesaid, gentleman, according to the form of the statute in such case made and provided, giveth the Court here to understand and be informed, that the Borough of Bolton, in the County of Lancaster aforesaid, is an ancient borough, and that the burgesses of the said borough for divers, to wit, twelve years next, before the passing of an Act of Parliament, made and passed in the sixth year of the reign of the

and disquiet one John Soames, and to do the said John Soames some grievous bodily harm, but also to provoke, instigate, and excite the said John Soames to break the peace, and to fight a duel with and against him, the said Jacob Newman, on the first day of April, in the eighth year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him, the said John Soames, a certain letter, and paper writing, directed by him, the said Jacob Newman, containing a challenge to fight a duel, with and against him, the said John Soames, and which said letter and paper writing is as follows, that is to say [*here set out the letter with such innuendos as may be necessary*] to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our Lady the Queen, her crown and dignity. (*Second Count*) And the said Coroner and Attorney of our Lady the Queen, who prosecutes as aforesaid, further gives the Court here to understand, and be informed, that the said Jacob Newman, contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously, did provoke, instigate, excite, and challenge the said John Soames to fight a duel, with and against him, the said Jacob Newman, to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity. And, therefore, the said Coroner and Attorney of our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Jacob Newman in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.*

* Archbold's Practice of the Crown Office, p. 41., edit. 1844.

II.—EX-OFFICIO INFORMATION BY THE ATTORNEY GENERAL.

Easter Term, in the eighth year of the reign of Queen Victoria.

Middlesex, to wit.—Be it remembered, that Sir William Follett, Knight, Attorney General of our Lady the now Queen, who prosecutes for our said Lady the Queen in this behalf, in his proper person, comes here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the fifteenth day of April, in this same term, and for our said Lady the Queen, gives the Court here to understand and be informed, that, &c. [*here state the subject-matter of the information*]. And, therefore, the said Attorney General of our said Lady the Queen, prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said George Grange, in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.

III.—QUO WARRANTO INFORMATION.

Of Trinity Term, in the eighth year of the reign of Queen Victoria.

Lancashire, to wit.—Be it remembered, that Charles Francis Robinson, Esquire, Coroner and Attorney of our Lady the Queen, in the Court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen in this behalf, in his own proper person, cometh here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the 26th day of May, in the same term, and for our said Lady the Queen, at the relation of James Strutt, of the Borough of Bolton, in the County of Lancaster aforesaid, gentleman, according to the form of the statute in such case made and provided, giveth the Court here to understand and be informed, that the Borough of Bolton, in the County of Lancaster aforesaid, is an ancient borough, and that the burgesses of the said borough for divers, to wit, twelve years next, before the passing of an Act of Parliament, made and passed in the sixth year of the reign of the

and disquiet one John Soames, and to do the said John Soames some grievous bodily harm, but also to provoke, instigate, and excite the said John Soames to break the peace, and to fight a duel with and against him, the said Jacob Newman, on the first day of April, in the eighth year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him, the said John Soames, a certain letter, and paper writing, directed by him, the said Jacob Newman, containing a challenge to fight a duel, with and against him, the said John Soames, and which said letter and paper writing is as follows, that is to say [*here set out the letter with such innuendos as may be necessary*] to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our Lady the Queen, her crown and dignity. (*Second Count*) And the said Coroner and Attorney of our Lady the Queen, who prosecutes as aforesaid, further gives the Court here to understand, and be informed, that the said Jacob Newman, contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the Parish aforesaid, in the County aforesaid, wickedly, wilfully, and maliciously, did provoke, instigate, excite, and challenge the said John Soames to fight a duel, with and against him, the said Jacob Newman, to the great damage, scandal, and disgrace of the said John Soames, in contempt of our Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity. And, therefore, the said Coroner and Attorney of our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said Jacob Newman in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.*

* Archbold's Practice of the Crown Office, p. 41., edit. 1844.

II.—EX-OFFICIO INFORMATION BY THE ATTORNEY GENERAL.

Easter Term, in the eighth year of the reign of Queen Victoria.

Middlesex, to wit.—Be it remembered, that Sir William Follett, Knight, Attorney General of our Lady the now Queen, who prosecutes for our said Lady the Queen in this behalf, in his proper person, comes here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the fifteenth day of April, in this same term, and for our said Lady the Queen, gives the Court here to understand and be informed, that, &c. [*here state the subject-matter of the information*]. And, therefore, the said Attorney General of our said Lady the Queen, prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said George Grange, in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.

III.—QUO WARRANTO INFORMATION.

Of Trinity Term, in the eighth year of the reign of Queen Victoria.

Lancashire, to wit.—Be it remembered, that Charles Francis Robinson, Esquire, Coroner and Attorney of our Lady the Queen, in the Court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen in this behalf, in his own proper person, cometh here into the Court of our said Lady the Queen, before the Queen herself, at Westminster, on the 26th day of May, in the same term, and for our said Lady the Queen, at the relation of James Strutt, of the Borough of Bolton, in the County of Lancaster aforesaid, gentleman, according to the form of the statute in such case made and provided, giveth the Court here to understand and be informed, that the Borough of Bolton, in the County of Lancaster aforesaid, is an ancient borough, and that the burgesses of the said borough for divers, to wit, twelve years next, before the passing of an Act of Parliament, made and passed in the sixth year of the reign of the

late King William the Fourth, entitled "an Act to provide for the Regulation of Municipal Corporations in England and Wales," and until the making and passing of the said Act, that is to say, until the — day of —, in the year of our Lord 18—, were one body corporate and politic, in deed, fact, and name, by the name of —; and since the said making and passing of the said Act, that is to say, from and after the said — day of —, have been, and still are, one body corporate and politic, by the name of —, of the Borough of Bolton, in the County of Lancaster, to wit, at the Borough of Bolton, in the County of Lancaster aforesaid; and that within the said Borough, pursuant to the provisions of the said Act, there hath been, and still of right ought to be, one mayor, divers, to wit, eight aldermen, and divers, to wit, twenty councillors, of the said Borough, to be elected in the manner in the said act specified; and that the office of mayor of the said Borough, ever since the making and passing of the said act, hath been, and still is, a public office, and an office of great trust and pre-eminence within the said Borough, touching the rule and government of the said Borough, and the administration of public justice within the same, that is to say, at the Borough of Bolton, in the said County; and that Julius Jenks, late of the Borough aforesaid, in the County aforesaid, gentleman, on the — day of —, in the seventh year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, at the Borough aforesaid, in the County aforesaid, did use and exercise, and thence continually afterwards, to the time of exhibiting this information, hath there used and exercised, and still doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of mayor of the said Borough, and for and during all the time last aforesaid, hath there claimed, and still doth claim, without any legal warrant, royal grant or right whatsoever, to be mayor of the said Borough, and to have, use, and enjoy all the liberties, privileges, and franchises to the office of mayor of the said Borough belonging and appertaining; which said office, liberties, privileges, and franchises, he the said Julius Jenks for, and during all the time last aforesaid, upon our said

Lady the Queen, without any legal warrant, royal grant, or right whatsoever, hath usurped, and still doth usurp, to wit, at the Borough of Bolton aforesaid, in the County aforesaid: In contempt of our said Lady the Queen, to the great damage and prejudice of her royal prerogative, and against her crown and dignity. And, therefore, the said Coroner and Attorney of our said Lady the Queen prayeth the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said Julius Jenks, in this behalf, to make him answer to our said Lady the Queen, and shew by what authority he claims to have, use, and enjoy the office, liberties, privileges, and franchises aforesaid.*

IV.—WRIT OF CERTIORARI.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, To the keepers of our peace and our justices assigned to hear and determine divers felonies, trespasses, and other misdemeanours, committed within our county of Northumberland, and to every of them, greeting: We being willing, for certain reasons, that all and singular indictments, of whatsoever [misdemeanours] whereof Peter Sly is before you indicted, as is said, be determined before us, and not elsewhere, do command you, and every of you, that you, or one of you, do send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of this our Writ, all and singular the said indictments, with all things touching the same, by whatsoever name the said Peter Sly may be called therein, together with this our writ, that we may cause further to be done thereon, what of right, and according to the law and custom of England, we shall see fit to be done. Witness, Thomas Lord Denman, at Westminster, the 25th day of May, in the eighth year of our reign.

BY THE COURT.

To be indorsed,—

By rule of Court, at the instance of the defendant or prosecutor.

* Archbold's Practice of the Crown Office, p. 135 ; edit. 1844.

V.—WRIT OF PROCEDENDO.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, To the keepers of our peace and our justices assigned to hear and determine divers felonies, trespasses, and other misdemeanours, committed within our County of Northumberland, and to every of them, greeting : Whereas, by our Writ, we lately commanded you, and every of you, for certain reasons, that you should send under your seals, or the seal of one of you, before us at Westminster, at a certain time now past, all and singular indictments, of whatsoever [misdemeanours] whereof Peter Sly was indicted before you, as was said, with all things touching the same, by whatsoever name the said Peter Sly should be called therein, together with the said writ to you directed, that we might cause further to be done therein, what of right, and according to the law and custom of England, we should see fit to be done : We do now, for certain reasons, command you, and every of you, that you do wholly supersede whatever is to be done concerning the execution of that our said writ ; and that you proceed to the determination of the [misdemeanours] aforesaid, with that expedition which to you shall seem right, and according to the law and custom of England, notwithstanding our writ as before sent to you directed for that purpose. Witness, Thomas Lord Denman, at Westminster, the 20th day of November, in the eighth year of our reign.

By the Court.

VI.—MANDAMUS TO COMPEL A TOWN COUNCILLOR TO SERVE THE OFFICE OF MAYOR.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, To John Singleton, Esquire, greeting : Whereas, heretofore, on the 21st day of December, in the year of our Lord one thousand eight hundred and forty-four, you, the said John Singleton, being then a councillor of our Borough of Newbury, in the County of Berks, were, in

due manner, elected and chosen into the office of mayor of our said Borough, to serve in the said office for one whole year then next following, of which said election you then had due notice ; and it then became, and was the duty of you, the said John Singleton, being so elected and chosen to the said office as aforesaid, to make and subscribe the declaration in that behalf, by law required, that you took upon yourself the said office, and would fulfil the duties thereof, according to the best of your judgment and ability : and it also then became, and was your duty, to take upon yourself and execute the duties of the said office of mayor of our said Borough of Newbury, for one whole year then next following, computed from the said twenty-first day of December aforesaid. And whereas we have been given to understand, in our Court before us, that after you were so elected and chosen, and had notice thereof as aforesaid, to wit, on the 22nd day of December, in the year of our Lord 1844, you the said John Singleton, were required to make and subscribe the said declaration, and take upon yourself and execute the said office of mayor, of our said Borough of Newbury, yet that you, the said John Singleton, not regarding your duty in that behalf, did absolutely neglect and refuse, and still do neglect and refuse, to make and subscribe the said declaration, and to take upon yourself and execute the said office of mayor, of our said Borough of Newbury, to the great damage and grievance of the said burgesses and inhabitants of the said Borough ; Whereupon, they have humbly besought us that a fit and speedy remedy may be provided in this respect. Now, we being willing that due and speedy justice be done in this behalf, as it is reasonable, do command you, the said John Singleton, firmly enjoining you, that immediately after the receipt of this our writ, you do, without delay, make and subscribe the declaration aforesaid, before some two of the aldermen or councillors of the said Borough, and do take upon yourself and execute the said office of mayor, of the said Borough of Newbury, for the residue of the said year, to be computed as aforesaid, or that you shew us cause to the contrary thereof, lest, in your default, the same complaint should be repeated to us. And how you shall have executed this our writ, make known to us at Westminster, on the fifteenth day of April now

next ensuing, then returning to us this our said writ. Witness, Thomas Lord Denman, at Westminster, the twenty-second day of January, in the eighth year of our reign.

By THE COURT.

By rule of Court.*

No. IX.

COURSE OF CRIMINAL PROCEDURE IN SCOTLAND.

WHEN a crime has been committed, the first step is, to arrest the supposed offender ; and this may be done under authority of any sheriff, justice of peace or other magistrate. Those magistrates may grant warrant to arrest persons charged with offences, in the trial of which they have themselves no jurisdiction. Thus, a sheriff may commit for treason, or the magistrate of a royal burgh for pleas of the Crown. The warrant for apprehension must be granted on sufficient information, written or verbal ; but the oath of the informer, even where he is a private party, is not indispensable ; and when the procurator-fiscal applies for the warrant, his oath is never required. The warrant must be dated, and under the hand of the magistrate in whose name it runs. It would seem that it may be general, as to the nature of the crime to be charged ; but it must not be general in the description of the person or persons to be apprehended, or leave any discretion to the officer to arrest all suspected persons. The warrant may be, to bring the accused before either the granter of the warrant, or some other competent magistrate ; and it may be addressed, either generally to the officers of the magistrate who grant it, or to messengers-at-arms ; or even, in case of need, to a private individual, who is thus invested, *pro hac vice*, with the powers, privileges and protection, given to an officer, provided the person intrusted with it proceed regularly in the execution of the warrant. In the case where the

* Archbold's Practice of the Crown Office, p. 251 ; edit. 1844.

party is brought before a magistrate for examination, it is the duty of the magistrate, 1st, To see that the prisoner is in a fit state to undergo an examination ; 2d, That he is warned of the use which may be made of what he says ; and 3d, That the declaration is taken down in writing in the presence of credible witnesses, who will sign it along with the magistrate and the prisoner, in order that, if necessary, they may be able, at the trial, to authenticate it and to swear to what passed. When the prisoner cannot or will not sign his declaration, the magistrate may sign it instead of him.

Unless the magistrate see reason immediately to release the prisoner, his next step is to commence an inquiry, or *precognition*, as it is termed, concerning the grounds of suspicion, in which he will take the declarations of such persons as have cause of knowledge of the offence, and the prisoner's participation in it. This is necessary, not only in order that speedy justice may be done to the accused, but also for the information of the public prosecutor, so as to enable him to lay his charge properly. While the precognition is going on, the magistrate may, if necessary, commit the accused to prison for further examination, or to abide the result of the precognition ; and, in that case, the prisoner is not entitled to bail under the act 1701, c. 6, although it is not unusual to liberate him on bail at this stage of the proceedings. The magistrate must proceed with the precognition without undue delay, otherwise he will be liable at common law for malversation and oppression. Witnesses may be compelled to attend the precognition by letters of first and second diligence ; and, in extreme cases, the witnesses may be examined upon oath, although that is not usual. If the witnesses refuse to attend or to swear, they may be imprisoned. Neither the accused nor his friends are entitled to be present at the precognition ; nor can they insist for a copy or for a perusal of the declarations of the witnesses. The precognition must be finished before the libel is executed, because, after the execution of the libel, the process has commenced, and all intercourse with the witnesses, after that, is suspected and "utterly forbidden." In whatever way the examinations of the witnesses at the precognition are taken, whether by oath or simple declaration, they never

can be used in any shape against the witnesses, who may insist on having them destroyed, before they give their testimony on the trial. Articles, to be founded on as proving the crime, ought to be identified at the precognition, either by the subscription of the judge and witnesses, or by some other mark, and a reference to the declaration of the witnesses ; and such articles are to be put in safe custody. The entire charge of conducting precognitions is now committed to the procurator-fiscal, sheriff, justices of the peace and other inferior magistrates, although, formerly, precognitions were sometimes conducted by the Lord Advocate in presence of the Lords of Justiciary. The precognition being concluded, and the facts being such as to warrant a commitment, the accused is then committed for trial, on a regular written warrant, specifying the offence for which he is committed, and proceeding on a signed information.

The right to prosecute for a crime is vested, by the law of Scotland, either in the party injured, or in the Lord Advocate, who is the only prosecutor for the public interest ; the popular actions of the Roman law being unknown in our practice. A criminal prosecution by the private party embraces not only the private interest and damages, but the full pains of law. But, in order to support the private instance, the party must be able to show some substantial and peculiar interest in the issue of the trial, not a mere remote interest as a member of the community, or even as the member of a portion or class of it, which has been particularly injured. It does not appear to be quite fixed, what degree of relationship to an injured party entitles a private party to prosecute ; but perhaps the right is vested in the next of kin, however remote in degree. But, in the Court of Justiciary, every libel at the private instance must be raised with concurrence of the Lord Advocate. The Lord Advocate is the public accuser, who insists in the Sovereign's name, and for his (or her) Majesty's interest, in the execution of the law ; and he is vested with an uncontrolled right to exercise his discretion, either in commencing or in following forth a trial ; and, at any time in the course of it, either before or even after the return of the verdict of the jury, he may, in case of a capital offence, restrict the libel to an arbitrary punishment.

The trial of an accused party proceeds before the Court of Justiciary, either on *indictment* or on *criminal letters*. The process by indictment is the exclusive privilege of the Lord Advocate, in whose name, as public prosecutor, it proceeds. Criminal letters resemble a summons in a civil action: they proceed in the Sovereign's name, and, like the summons, they are addressed to messengers and other executors of the law, who are commanded to cite the accused. The form of indictment is commonly used where the accused is in prison; and that of criminal letters, where he is at large, either on bail or otherwise, although there is no invariable rule on that subject. The indictment or criminal letters must be executed against the accused by a messenger-at-arms, or by a macer of the Court of Justiciary, or other officer properly authorised, who must serve the party with a copy of the libel, with a notice attached, requiring him to appear on a day certain to take his trial; see 9 *Geo. IV.*, c. 29, § 6, *et seq.*, and *schedules thereto annexed*. The accused must, at the same time, be served with a list of the witnesses who are to be examined against him, and of the whole assize of forty-five, out of which the jury is to be selected. If the accused cannot be found, he must be cited in the same form at his dwelling-place, and at the market-cross of the head burgh of the county in which he resides. When he is abroad, an edictal citation of sixty days at the market-cross of Edinburgh, and the pier and shore of Leith, is necessary. The diet to which he is cited in a criminal process is peremptory. And, on the day fixed, the accused and the prosecutor, whether public or private, must appear in court, the Lord Advocate having the privilege of appearing by his deputies; but the personal presence of the private party, where he is the prosecutor, being indispensable. The accused must also be present, otherwise the trial cannot proceed; and, if he is wilfully absent, sentence of fugitation will be pronounced. When both parties are present, and the trial is not adjourned, the court, upon the prosecutor's application, and on cause shown, may desert the diet *pro loco et tempore*; after which the accused may be served with a new libel; or the prosecutor may desert the diet *simpliciter*, which puts an end to all farther prosecution for the same offence. When both parties are present at the calling of

the *Assize*, and there is no desertion, this is the proper time to *leave* of the process, to state all objections to the execution of the citation of the party. If no such objection be stated, the presiding judge calls on the accused to attend to the libel, which is read aloud to him except when he pleads not guilty, and dispenses with the reading of the libel; 9 Geo. IV., c. 29, § 12; and he is then asked for his plea of guilty or not guilty, which is immediately entered on the record. Even where the accused pleaded guilty, it was formerly the practice to empanel a jury, before whom, if he repeated his plea, he was found guilty by the jury on his own confession; but, by 9 Geo. IV., c. 29, § 14, the necessity of empanelling a jury, where the accused pleads guilty, is dispensed with. Where, in addition to the general plea of not guilty, the accused means to insist on some special defence, he must, at this stage of the proceedings, either by himself or his counsel, state generally the nature of the course of defence he means to adopt. By 20 Geo. II., c. 43, it is required, that in such a case, the accused shall, on the day before his trial, lodge with the clerk of court a written statement or defence, signed by himself or his counsel, of the facts he alleges, and the heads of the objections or defences he means to maintain; and, where such a defence is not lodged, it would seem that the prosecutor, on the day of trial, may at least insist on having an outline of the course of defence; and, accordingly, in all cases where such special defence is pleaded, it is usual either to lodge defences, or to explain the nature of the defence in the outset of the trial. This is followed by the objections to the relevancy of the libel, if there be any such objections; and, after a *viva voce* debate, that question is disposed of by the court, either by an immediate decision, or by an order for farther pleadings in the shape of printed *Informations*; and, in that case, the trial is adjourned. If the libel be found relevant, a jury of fifteen persons from the assize of forty-five is ballotted for; the prosecutor and the accused having each of them five peremptory challenges, and an unlimited number of challenges upon cause shown; 6 Geo. IV., c. 22. The jury are then sworn in, and the trial proceeds,—the prosecutor, in the *first* place, leading evidence in support of the libel, after which the exculpa-

tory evidence is adduced. After the proof on both sides has been concluded, the counsel for the parties address the jury, on the import of the evidence, the counsel for the accused, except in cases of treason, having the last word; *Regulations*, 1672, No. 10. The presiding judge then sums up the evidence, and states the law to the jury. The jury need not be unanimous in their verdict, and, in case of difference, the majority decide. Formerly, no verdict of a jury was good if made up in open court; but, by 54 Geo. III., c. 67, the Court of Justiciary and circuit courts, were authorised to receive verdicts from the jury, by the mouth of their chancellor, on a consultation in the jury-box, provided the whole jurymen were agreed in their verdict; and, even when the jury had retired, the court was authorised, by the same statute, to receive *visa voce* verdicts, provided the jury were all agreed in the verdict, and that the judges were then sitting in court. And now, by 6 Geo. IV., c. 22, § 20, all verdicts in the High Court of Justiciary, or the Circuit Court, or in inferior courts, whether the jury are unanimous or not, and whether on a consultation in the jury-box, or after having retired, may be returned by the mouth of the chancellor of the jury, unless the court has directed a written verdict to be returned. But where the jury is not unanimous, the Chancellor must announce the fact, in order that it may be entered on the record; and when, in such cases, a jury is inclosed, the jury is not allowed to separate, or to hold communication with other persons, until their verdict has been returned in their presence, by their Chancellor. The verdict must be returned to the court, in presence of the accused, and of the whole jury. The verdict, when in writing, is authenticated by the subscriptions of the Chancellor and clerk of the jury, and accompanied with a list of the names of the jurors, and a state of the vote of each individual, "whether condemning or assolilzieing;" *Regulations*, 1672, No. 9. If the verdict be *not guilty* or *not proven*, or in any other way amount to an *absolutor* of the crime libelled, the accused is immediately dismissed from the bar. If the verdict be condemnatory, the prosecutor then moves the court to apply it; when, if there be no pleas stated by the accused in arrest of judgment, sentence is pronounced by the presiding judge, and afterwards read out by the clerk from the record, and subscribed by all the judges

present. In Scotland, a sentence importing capital punishment cannot be carried into execution within less than fifteen or more than twenty-one days after its date, if pronounced to the southward of the Forth, or within less than twenty or more than twenty-seven days, if to the north of that river. Inferior corporal punishments may be carried into execution after the lapse of eight or twelve days from the passing of the sentence, according as it is pronounced on the south or north of the Forth ; 11 Geo. I., c. 26, and 3 Geo. II., c. 32 ; 1 Will. IV., c. 37, § 2. And the Court of Justiciary has a power to interfere in altering the day for the execution of sentences, when particular circumstances render such an interference necessary. The sentences of the Court of Justiciary are not subject to review, or to appeal to the House of Lords ; and, unless the royal mercy be interposed, execution will follow in terms of the sentence.

The account of criminal process, which has now been given, has reference to proceedings in the High Court of Justiciary, at Edinburgh, and in the circuits of that court, where the forms of process are almost precisely similar. The sheriff also has a very extensive criminal jurisdiction, extending to the trial of many of the higher crimes by means of a jury, and entitling him to convict summarily without the intervention of a jury, in minor offences ; the privilege of summary conviction being a branch of the criminal jurisdiction of the sheriff, which he shares with justices of the peace and the magistrates of royal burghs. With regard to those inferior jurisdictions, it may be observed in general, that where express statute does not interfere, the criminal proceedings in all of them are subject to the review of the High Court of Justiciary.

The Court of Session, partly by usage and partly by statute, may take cognisance of the crimes of forgery, perjury, deforcement, fraudulent bankruptcy, contempts, &c. This court tries and punishes those offences without the intervention of a jury ; and its sentences are not subject to review in the Court of Justiciary ; but the criminal jurisdiction of the Court of Session is never exercised, unless where the offence has been committed or discovered in the course of proceedings in a civil action before it ; and, even in that case, the practice now is to remit the criminal part of the case to the Court of Justiciary.

No. X.

SPECIMENS OF ECCLESIASTICAL PLEADINGS.

I.—TESTAMENTARY SUIT. LITIGATION OF A WILL, ON THE GROUND
OF THE TESTATOR'S INSANITY.1. *Allegation propounding the Will, on the part of the Executrix.*

IN THE PREROGATIVE COURT OF CANTERBURY.

On the Caveat day of Trinity Term, to wit, on the 20th day of June, 1845.

C. Q. } A business of proving, in solemn form of law, by
against } good and sufficient witnesses, the last will and testa-
M. W. } ment of W. G., late of B. P., in the county of —,
deceased ; promoted and brought by M. W., the executrix therein
named, against C. Q., the natural and lawful sister, and only next
of kin, of the said deceased.

On which day Y. Z., in the name and as the lawful proctor of
the said M. W., party in this cause, exhibited the true and original
last will and testament of the said W. G., deceased, now remain-
ing in the registry of this Court, annexed to an affidavit of his
said parties as to scripts, and marked with the letter A., the said
will beginning thus, “ ” ending thus, “ ” and
thus subscribed, “ ” and by all better and more effectual
ways and means, and methods, and to all intents and purposes in
the law whatsoever, which may be most beneficial and effectual
for his said parties said, alleged, and in law articulately pro-
pounded, as follows (to wit).

First. That the said W. G., the party in this cause deceased,
having a mind and intention to make and execute his last will
and testament in writing, and thereby to settle and dispose of
his estate and effects, did give directions and instructions for the
making and drawing thereof ; and pursuant and agreeably to
such directions and instructions, the very will pleaded and pro-
pounded in this cause on the part and behalf of the said M. W.,
and marked with the letter A., beginning, ending, and subscribed
as aforesaid, was drawn up and reduced into writing ; and after it

was drawn up and reduced into writing, the same was all read over audibly and distinctly to or by the said deceased, who well knew and understood the contents thereof, and liked and approved of the same ; and in testimony of such his good liking and approbation, he the said deceased did, on or about the — day of —, one thousand eight hundred and —, being the day of the date of the said will, set and subscribe his name and affix his seal thereto, in manner and form as now appears thereon ; and did publish and declare the same as and for his last will and testament, in the presence and hearing of divers credible witnesses, who, or at least three of whom, did in his presence, at his request, and in the presence of each other, severally set and subscribe their names as witnesses to the due execution thereof, in manner and form as now appears thereon ; and he the said deceased did in and of his said will nominate and appoint the said M. W. sole executrix ; and did give, will, bequeath, devise, dispose, and do in all things as in the said will is contained, and was at and during all and singular the premises of perfect, sound and disposing mind, memory and understanding, and well knew and understood what he said and did, and what was said and done in his presence, and talked and discoursed rationally and sensibly, and was fully capable of giving instructions for and of making and executing his will, or of doing any other serious or rational act of that or the like nature, requiring thought, judgment, and reflection ; and this was and is true, public and notorious ; and so much the said C. Q., the other party in this cause, doth know or hath heard, and in his conscience believes and hath confessed to be true ; and the party proponent doth allege and propound everything in this and the subsequent articles of this allegation contained jointly and severally.

Second. That all and singular the premises were and are true, and so forth.

2. *Allegation of Next of Kin, impeaching the Validity of the Will.*

IN THE PREBOGATIVE COURT OF CANTERBURY.

On the first session of Michaelmas Term (to wit), Friday the 6th day of November, in the year of our Lord 1845.

C. Q.	}	On which day R., in the name and as the lawful proctor of C. Q. (wife of I. Q.), the natural and lawful sister and only next of kin of W. G., the party in this cause deceased, and under that denomination, and by all better and more effectual ways, means, and methods, which may be most beneficial for his said party, did say, allege, and in law articulately propound as follows, to wit :
against M. W.		

First. That the said W. G., the party in this cause deceased, died on the — day of — last, in consequence of having shot himself with a pistol, being then in an insane state of mind. That he died a widower, without child or parent, aged about forty-five years, leaving him surviving the said C. Q. (wife of I. Q.), his natural and lawful sister, and only next of kin, and a niece, the child of another sister, who died in his lifetime, the only persons who will be entitled to his personal estate and effects, in case he shall be pronounced to have died intestate. That the said deceased was at the time of his death possessed of and entitled to personal estate and effects of the value of £1200, or thereabouts, and of real estate of the value of £700, or thereabouts. And this was and is true, public and notorious, and the party proponent doth allege and propound everything in this and the subsequent articles of this allegation contained jointly and severally.

Second. That the said deceased, at all times, whilst he retained the use of his mental faculties, had and expressed a regard and affection for his said sister, the said C. Q., party in this cause, who had a family of six children, and declared his intention to leave her a considerable portion of his property by his last will and testament, or to that effect. And this was and is true, public and notorious ; and the party proponent doth allege and propound as before.

Third. That the said deceased, who was always of very weak and slender capacity, and very eccentric in his manners and

behaviour, but more particularly during the last ten or twelve years of his life, after the decease of his wife, became very inconsistent in his conduct, and laboured under an aberration of mind. That in consequence thereof, he, the deceased, was liable to be imposed upon by artful and designing persons, and that owing to impositions practised upon him by such during the said last ten or twelve years of his life, he lost and was deprived of considerable sums of money and other portions of his property; that he frequently forgot what he said and did, and directed to be done by others, shortly afterwards; talked in a wild, rambling, and incoherent manner; expressed great apprehension that he had or should become poor and distressed, and die in the workhouse; became very much altered in his person and appearance, neglected his dress, and did so many strange and extraordinary acts, that he was looked upon and considered by the different persons who saw and had transactions with him to be (as in fact he was) of unsound mind, memory, and understanding. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

[After setting out at length in several articles, various acts of extravagance and absurdity on the part of the testator, showing his mental imbecility, and the executrix's knowledge of his condition, the allegation from which this specimen is taken, thus proceeded;—]

Tenth. That the making and writing of the pretended will of the said deceased, propounded in this cause on the part and behalf of the said M. W., was not the free and spontaneous act of the said deceased, but was procured to be made and written by him by the arts and contrivance of the said M. W. and I. W., her husband, who took advantage of the weak and unsound state of the deceased's mind for that purpose. That in the course of writing the same the deceased several times complained of the great inconvenience he felt from writing, and wished not to complete the said pretended will, but was compelled or induced to go on and finish the same by the threats and importunities of the said M. W., and I. W., and of Y., who is a relation of the said I. W., and steward to the Earl of M., all of whom were

present with the said deceased at such time, and urged him to write, and afterwards to execute the said pretended will. That from the conduct and behaviour of the said deceased on such occasion he appeared to be, as in fact he was, a person of unsound mind, and incapable of making his will or doing any act of that or the like nature, which required thought, judgment, and reflection. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Eleventh. That shortly after the said deceased had been compelled or induced to write and execute the said pretended will propounded in this cause, as pleaded in the eighth article of this allegation, he entertained an idea that the same was a deed of gift, and that he had thereby deprived himself of his property or of some considerable portion thereof, he became still more affected and distressed in his mind, and more frequently expressed his fears that he must go or should be taken to a workhouse, hoping in that event he should be taken to a workhouse at some distance, where he would not be known, and at length, under the influence of such ideas or apprehensions, he destroyed himself by shooting himself with a pistol as aforesaid. That a coroner's inquest was thereupon duly held upon the body of the said deceased, of which the said Y. was foreman; and the jury so impannelled by their verdict found that the said deceased at such time was in an unsound state of mind, or to that effect. And this was and is true, public and notorious, and the proponent party doth allege and propound as before.

Twelfth. That all and singular the premises were and are true, and so forth.

3. *Responsive Allegation insisting on the Testator's Sanity, and the Validity of the Will.*

IN THE PREROGATIVE COURT OF CANTERBURY.

On the first session of — Term, to wit, —, the — day of —, in the year of our Lord —.

C. Q.	}	On which day Y. Z., in the name and as the
against		lawful proctor of M. W. (wife of J. W.), and under
M. W.		that denomination, and by all better and more

effectual ways, means, and methods, and to all intents and purposes in the law whatsoever which may be most beneficial and effectual for his said party, said, alleged, and in law articulately propounded as follows, to wit:—

First. That W. G., late of —, in the parish of —, in the county of —, the deceased in this cause, was at all times as well before as after the making and execution of his last will and testament, bearing date the — day of —, in the year —, of sound mind, memory, and understanding, talked and discoursed rationally and sensibly, and well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of making and executing his last will and testament in writing, or of doing any other serious or rational act of that or the like nature requiring thought, judgment, and reflection, and although rather eccentric in his manners, never laboured under any aberration of mind, save in the instance of his having put an end to his existence by shooting himself; and this was and is true, public and notorious, and so much C. Q., the other party in this cause, doth know and in her conscience hath confessed to be true. And the party proponent doth allege and propound everything in this article contained jointly and severally.

Second. That the said deceased for many years before and until the time of his death, had a very great regard and affection for the said M. W., who was the — of his late wife —, who died in the year —, and he the said deceased frequently and down to the time of his death declared such his regard and affection for her, and that she should be the object of his bounty at the time of his death, and made other declarations to that or the like effect. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Third. That the said deceased became very much offended with the said C. Q. for marrying the said J. Q. against his consent, which marriage took place about — years since, on which occasion, and frequently afterwards, the said deceased declared that he never would have any concern with her, and the said deceased for several years before his death had no intercourse with the said C. Q., and frequently and down to a late

period of his life declared that she never should have any part of the property which he possessed, that if he had ten thousand pounds she never should have a shilling of it, for it would be useless to give her anything, as her husband would spend it if he did ; and he, the said deceased, made other declarations to that or the like effect. And this was and is true, public and notorious, and so forth.

[Then follow several articles explaining or denying the facts charged in the allegation of the next of kin.]

Seventh. That the making and the writing of the last will and testament of the said deceased propounded in this cause, bearing date the 2nd day of February, 1828, was a free and spontaneous act of the said deceased, and was not procured to be made by any acts or contrivance of the said M. W., party in this cause, or her husband J. W., neither of whom knew that he had made such will until some time after the execution thereof ; nor did the deceased complain of any inconvenience he felt from writing, or a wish not to complete the same, nor was he compelled or induced to go on and finish the same by the threats and importunities of the said M. W. and J. W., or of J. Y., the steward to the Earl of M. nor is the said J. Y. in any manner related to the said J. W., or to his wife the said M. W., as in the eighth position or article of the said allegation is falsely alleged and pleaded ; and the party proponent doth further allege and propound, that neither the said M. W., nor J. W., nor J. Y., were present at such time or in the house wherein the same was written or executed. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Eighth. That after the said deceased had wrote and executed his said will, he did not entertain an idea that the same was a deed of *gift*, or that he had thereby deprived himself of his property, or of a considerable part of it, and in consequence thereof became distressed in his mind, or express his fear that he must go or should be taken to a workhouse, as in the ninth position or article of the said allegation is falsely alleged and pleaded ; on the contrary, he, the said deceased, several times recognised his said will, and declared that on his death the said M. W. and her

husband would be materially benefited, or to that effect, that when repairs were doing at his said house in B. P., in or about the month of December, 1827, the said declared he was doing all for the benefit of the said J. W. and M. W., or to that effect; and on or about Thursday, the 12th day of June, in the said year 1828, the said deceased attended the christening of W., a child of the said J. W. and M. W., his wife, on which occasion he, the deceased, distinctly declared to the said R. S. that he had made his will, and that he had given P., thereby meaning the said M. W., his house in B. P., and everything in it, and had also given her further property, as he had before told him he meant to do, and that he had made her executrix, or to that effect. And this was and is true, public and notorious, and the party propounding doth allege and propound as before.

Ninth. That all and singular the premises were and are true, public, and notorious, and so forth.*

II.—ARTICLES EXHIBITED IN THE ARCHES COURT OF CANTERBURY,
ON THE PART OF THE BISHOP OF LONDON, AGAINST A CLERGY-
MAN, FOR AN ECCLESIASTICAL OFFENCE, IN HOLDING AND
PUBLISHING HERETICAL DOCTRINES.

IN THE ARCHES COURT OF CANTERBURY.

In the name of God, Amen.—We, Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, do by virtue of our office, at the voluntary promotion of Christopher Hodgson, of Dean's Yard, Westminster, in the county of Middlesex, Esq., object, give, and administer to you, the Rev. Frederick Oakeley, a Clerk in Holy Orders of the United Church of England and Ireland, and Minister of Margaret Chapel, in the District Rectory of All Souls, St. Marylebone, in the county of Middlesex, diocese of London, and province of Canterbury, all and singular the articles, heads, positions, or interrogatories hereunder written, or hereafter mentioned, touching and concerning your soul's health, and reformation of your manners and excesses; and more especially for your

* From Chitty's General Practice, vol. iv. pp. 167, *et seq.*

having offended against the laws, statutes, constitutions, and canons ecclesiastical of the realm, by having written and published a pamphlet entitled ‘ A Letter to the Lord Bishop of London, on a subject connected with the recent proceedings at Oxford,’ in which said pamphlet or letter doctrines are advisedly maintained and affirmed directly contrary or repugnant to the true usual literal meaning of the Articles of Religion, as by law established, or some or one of them, and contrary to the said laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the aforesaid United Church of England and Ireland, as it is now by law established.

First. We article and object to you, the said Reverend Frederick Oakeley, clerk, that you know, believe, or have heard, that by the laws, statutes, constitutions, and canons ecclesiastical, persons of what rank or condition soever have been admitted into holy orders of the United Church of England and Ireland, ought to adhere to and maintain with constancy and sincerity the doctrines of the said Church, as by law established ; and that whosoever having been so admitted, and having subscribed and declared his assent to the Articles of Religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our Lord 1562, and ratified by the Royal authority, shall revolt from or impugn or deprave the said articles, or any of them, or any of the doctrines therein contained, ought to be punished and corrected according to the gravity of his offence and the exigency of the law. And we article and object of everything in this and the subsequent articles contained jointly and severally.

Second. Also, we article and object to you, the said Reverend Frederick Oakeley, clerk, that on or about the 8th day of July, in the year of our Lord 1839, you did willingly subscribe to the Thirty-nine Articles of religion of the United Church of England and Ireland, and to the three articles of the 36th canon, and to all things contained in them ; and you did declare that you would conform to the Liturgy of the United Church of England and Ireland, as it was then by law established, and we article and object to you as before.

Third. Also, we article and object to you, the said Reverend Frederick Oakeley, clerk, that you for many years last past have been, and now are, a priest or minister in Holy Orders of the United Church of England and Ireland, and minister of Margaret Chapel, in the district rectory of All Souls, St. Marylebone, in the county of Middlesex, and diocese of London, and province of Canterbury, and have been licensed by the Right Honourable and Right Reverend Father in God, Charles James, by divine permission, Bishop of London, to perform the office of minister of the said chapel, by and with the consent of the Reverend George Chandler, Doctor in Divinity, rector of the said district, and that for and as such, and as the lawful minister of the said chapel, you have for several years last past been, and now are, commonly accounted, reputed, and taken to be. And we article of any other time, parish, ordination, institution, induction, benefice, preferment, or promotion, as shall appear from the lawful proofs to be made in this cause as before.

Fourth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, and in supply of proof of the premises in the next preceding article mentioned, and to all other intents and purposes in the law whatsoever, we do exhibit, and hereto annex a certain paper writing, marked with the letter A, and will that the same be received and taken as part and parcel hereof, and as if here read and inserted, and do article and object the same to be and contain a true copy of the act on licensing you, the said Rev. Frederick Oakeley, to perform the office of minister of Margaret Chapel, in the district rectory of All Souls, St. Marylebone, in the county of Middlesex, diocese of London, and province of Canterbury aforesaid ; and that the same has been faithfully extracted from the book of acts of the said Lord Bishop of London, preserved in the office or custody of Christopher Hodgson, Esq., as secretary of the said Lord Bishop, and hath been carefully collated with the original entry now remaining therein, and agrees therewith, that all and singular, the contents of the said exhibit were and are true, that all things were so had and done as are therein contained ; and that Frederick Oakeley, clerk, therein mentioned to have been licensed to perform the office of minister

of Margaret Chapel, in the district rectory of All Souls, St. Marylebone, in the county of Middlesex, and diocese of London, aforesaid, with the consent of the Rev. Dr. George Chandler, the rector of the said district ; and you, the said Frederick Oakeley, clerk, the party article and objected against in this cause, were and are one and the same person, and not divers, and that Margaret Chapel, in the district rectory of All Souls, St. Marylebone, mentioned in the said exhibit, and the aforesaid Margaret Chapel, in the district rectory of All Souls, St. Marylebone, several times mentioned in these articles, was and is one and the same chapel, and not divers ; and we article and object to you as before.

Fifth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, that notwithstanding the premises in the foregoing articles contained, you, the said Frederick Oakeley, at divers and sundry times, or at least once within two years previously to the date of the decree issued in this cause, have advisedly, in writing and otherwise, maintained and affirmed, and do maintain and affirm, doctrines which we article and object to you to be directly contrary or repugnant to the true usual literal meaning of the said articles of religion as by law established, some or one of them, as hereinafter more particularly mentioned. And this was and is true ; and we article and object as before.

Sixth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, that some time in the year of our Lord 1845, you, the said Frederick Oakeley, wrote and published, or caused to be published, a certain pamphlet entitled, " A Letter to the Lord Bishop of London, on a subject connected with the recent proceedings at Oxford," in which pamphlet or letter you advisedly maintained and affirmed, and declared you maintained and affirmed, and do maintain and affirm, doctrines directly contrary or repugnant to the true usual literal meaning of the articles of religion as by law established, some or one of them, and contrary to the laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the Church. And this was and is true ; and we article and object to you as before.

Seventh. Also, we article and object to you, the said Rev.

Frederick Oakeley, clerk, that in the said pamphlet or letter mentioned in the next preceding article are contained the following passages :—

“I do not deny that it may naturally strike your lordship as a gratuitous and disturbing movement, nor again could I be surprised to hear that your lordship had been seriously startled by my opinion, that the articles are subscribable in what may be called an ultra-Catholic sense, so as to involve no necessary renunciation on the subscriber's part of any formal decision of the Western Church, and that I myself actually so subscribe them.

“And now I wish to draw your lordship's attention to the following point :—The distinction in question is, as I contend, wholly irrelevant to my question with the university, for in the university it is not the practice of teaching certain doctrines which is even apparently impugned, but the claim to hold them. Mr. Ward himself never claimed to teach Roman doctrine ; on the contrary, he urges over and over again that such a procedure would be highly wrong under our circumstances. What he maintains, and what the vote of Thursday seems to deny, is the honesty of subscribing the articles in a certain sense. The university then cannot pretend to let me off on the ground of the above distinction, for in respect to it I differ in no way from Mr. Ward, whom it has by the hypothesis condemned. Mr. Ward does not claim to teach—I claim to hold.

“But, with your lordship, I contend, this distinction ought to and will receive consideration. Were I to be found teaching Roman doctrine in my public ministrations in your lordship's diocese, I should, as I feel most deservedly, expose myself to your lordship's censure. It is plain that your lordship, as a bishop of our Church, could not and would not suffer it.

“It may be replied that my public declaration on the subject of subscription precludes me from preaching against the Roman doctrines ; most assuredly it does. If my obligations, as an English clergyman, require me to controvert the doctrines of Rome, then I freely admit I do not fulfil those obligations. But surely, my lord, if I be justified in considering that there are things

among us to be done, more important than controverting dissent, *a multo fortiori*, am I bound upon any Catholic principles whatever, not to be harder upon what your lordship acknowledges to be a branch of the Catholic Church, than upon those who are not even members of the Church of England?

"But here I shall be asked, is then your claim to hold (as distinct from teaching) all Roman doctrine, no more after all than the assertion of a right to a merely speculative opinion? Because, if so, you are doing yourself injustice, and coming forward in an obnoxious character for no sufficient purpose.

"I reply, frankly, that my opinion is not merely speculative. I hope none of my opinions on religious subjects are merely speculative. If I say that the view in question is not practical, I mean that it in no way affects my teaching, except negatively.

"Still I do not at all deny that where I plead for the utmost latitude in the interpretation of our formularies on the Catholic side, I mean something very real, and in a certain sense very practical. Now, then, I will crave your lordship's kind attention for a while, that I may say what I do mean by the exceeding reluctance I feel to accept anti-Roman limitations of our articles and Prayer-book. I will try to analyze the feeling under which I regard it as a point of duty to my own communion to extract, nay, and to extort, the most Catholic meaning possible from her apparently anti-Catholic determinations, and why, moreover, I cannot consent to draw those distinctions between the Catholic and the Roman sense upon which some of my respected friends are disposed to lay so great a stress.

"My lord, I am not in the number of those who are able to draw a line between the earlier and the later decisions of the Catholic Church.

"The ramifications of heretical invention would appear to be almost indefinite and incalculable; but so many as are the extravagancies of that theological error, so many also must be the safeguards of orthodoxy. I will never believe, then, that the strong current of dogmatic theology was suddenly frozen up in the fourth or the sixth century of the Christian era. Moreover, I believe also that in the latter centuries heresy assumed quite a new shape, and

whereas, in earlier times, it occupied itself in dealing with the objective doctrines of the Gospel, in the more modern ages it caught the subjective spirit of the times, and issued in all kinds of fatal speculations upon matters connected with the internal life of the Christian—such, for example, as the mode of his justification in the sight of God. Shall I suppose the Church to have been silent on such emergencies? On the contrary, I believe her to have been ready at Trent and at Nice with her scholastic definitions and her preclusive anathemas; and so in the times intermediate. That sort of relation which the Athanasian creed bears to the Apostles', I believe that still later dogmatical decisions will bear to it. With these feelings your lordship can hardly wonder that I should deem so well of my Church to suppose, without overpowering reason, that she directly and unequivocally contravenes the decree of even the later councils. What? A body of divines in one corner of the world (good men, I doubt not, in their way, yet merely exposed, and apparently not superior to exterior influences) set about deliberating to call in question the solemn acts of the assembled prelates of Christendom?"

A copy of which said letter, so written and published by you, the said Rev. Frederick Oakeley, clerk, as aforesaid, we do exhibit, and hereto annex, in part supply of proof of the premises in this and the preceding articles mentioned, and will that the same be taken and read, as if here inserted (the same being marked with the letter B); and we article and object to you as before.

Eighth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, that, on or about the 25th of February, in the present year 1845, you wrote, addressed, and sent a letter to the said Lord Bishop of London, and which was duly received by his lordship, in which letter you stated that you had been enabled to put out a pamphlet in the shape of a letter to his lordship, and which pamphlet or letter we article and object to be the very pamphlet or letter several times mentioned in these articles as being written and published by you as aforesaid; and we article and object to you as before.

Ninth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, and in supply of proof of the premises in the

next preceding article mentioned, and to all other intents and purposes in the law whatsoever, we do exhibit and hereunto annex certain papers, writing marked with the letter C, and will that the same be received and taken as part and parcel hereof, and as if here read and inserted, and do article and object the same to be and contain the said letter mentioned in the preceding article, bearing date as aforesaid, on or about the 25th day of February, 1845. And we further article and object to you, the said Rev. Frederick Oakeley, that all and singular the contents of the said exhibit (with the exception of the endorsement and lettering, and the subscription thereto), were and are of your proper handwriting and subscription, and were and are so well known or believed to be by divers persons of good credit, who are well acquainted with your handwriting and subscription ; and we article and object to you as before.

Tenth. Also, we article and object to you, the said Rev. Frederick Oakeley, clerk, that were and are of Margaret-street, Cavendish-square, in the county of Middlesex, diocese of London, and province of Canterbury aforesaid, and that there was and is a scandal and evil report in the said diocese against you, the said Rev. Frederick Oakeley, clerk, as having offended against the laws ecclesiastical by having written and published, or caused to be published, the said pamphlet or letter to the said Lord Bishop of London, in several of the preceding articles mentioned, and that by reason thereof, and of a certain act or statute made in the parliament holden at Westminster in the third and fourth years of the reign of her present Majesty, Queen Victoria, entitled "An Act for better enforcing Church Discipline," and of the letters of request under the hand and seal of the Lord Bishop of the diocese of London, presented and accepted in this cause, you were and are subject to the jurisdiction of this Court ; and we article and object to you as before.

Eleventh. And we article and object to you, the said Rev. Frederick Oakeley, clerk, that of and concerning the premises, it hath been and is rightly and duly complained by the said Christopher Hodgson, the voluntary promoter of our office, to us the judge aforesaid, and to this Court, and this was and is true ; and we article and object to you as before.

Twelfth. Also, we article and object to you, the said Rev.

Frederick Oakeley, clerk, that all and singular the premises were and are true, public, and notorious, of which legal proof being made to us, the judge aforesaid, and to this Court, we will that you, the said Rev. Frederick Oakeley, be duly and canonically corrected and punished, according to the gravity of your offence, and the exigency of the law, and that you be condemned in the costs made and to be made on the part and behalf of the said Christopher Hodgson, the promoter of our office in this cause, and compelled to the due payment thereof. And that it further be done and decreed in the premises as to right and justice shall appertain, the benefit of the law being always preserved.

* * * The foregoing Articles seem to be of a very general and sweeping character. Mr. Oakeley made no defence, and the cause was consequently heard in his absence before Sir Herbert Jenner Fust; who on the 30th June, 1845, gave judgment revoking Mr. Oakeley's licence, prohibiting him from performing any ministerial office within the province of Canterbury till he should have retracted his errors; and condemning him in the costs of the proceedings.

III.—MATRIMONIAL SUIT FOR A DIVORCE, *A MENSA ET THORO*, ON THE GROUND OF ADULTERY, BY WIFE AGAINST HUSBAND.

In the name of God, Amen. Before you the Right Honourable Sir Herbert Jenner, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, your surrogate, or any other competent judge, in this behalf; the proctor of M. K., of the parish of —, in the county of —, deanery of —, and province of Canterbury, against W. K., the lawful husband of the said M. K., of the parish of —, in the county of —, diocese of —, and province aforesaid; and against all and every other person or persons lawfully appearing or intervening in judgment for him before you, by way of complaint and hereby complaining unto you in this behalf, doth say, allege, and in law articulately propound as follows, to wit:—

First. That in the several months of — —, in the year of our Lord —, the said W. K. being then a bachelor and a

minor, of the age of — years and upwards, but under the age of twenty-one years, and free from all matrimonial contracts and engagements whatever, did make his courtship and addresses in the way of marriage to the said M. K., then M. S., spinster, and the said M. K., being then a minor, of the age of — years and upwards, but under the age of twenty-one years, but also free from all matrimonial contracts and engagements whatever, did accept such his courtship and addresses, and did consent and agree to be married to him the said W. K. ; that in pursuance thereof, the said W. K. and M. K. were on or about the — day of —, in the year of our Lord —, lawfully joined together in holy matrimony in the parish church of —, in the county of —, by the Rev. — —, a clerk or minister in holy orders of the Church of England, or then officiating as such, according to the rites and ceremonies of the Church of England as by law established, by virtue of banns first duly had and published. And he, the said Rev. — — then and there pronounced them to be lawful husband and wife in the presence and hearing of divers creditable witnesses, and an entry of such marriage was duly made in the register book of marriages kept for the said parish of —, in the county of — aforesaid. And this was and is true, public and notorious ; and so much the said W. K., the other party in this cause, doth know, or hath heard, and in his conscience believes and hath confessed to be true. And the party proponent doth allege and propound, of any other time and times, place and places, and person or persons as shall appear from the proofs to be made in this cause, and every thing in this and the subsequent articles of this libel contained jointly and severally.

Second. That in part supply of proof of the premises mentioned and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth hereto annex, and prays to be here read and inserted, and taken as part and parcel hereof, a certain paper writing or exhibit marked with the letter (A), and doth allege and propound the same to be and contain a true copy of the entry of marriage of the said W. K. and M. K., formerly M. S., in the next preceding article mentioned, that the same hath been faithfully extracted from the

registry book of marriages kept in and for the said parish of —, and carefully compared with the original entry now remaining therein, and found to agree therewith. That all and singular the contents of the said exhibit were and are true, and all things were so had and done as therein contained; and that M. K. wife of the said W. K. late M. S., therein mentioned, and M. K. (formerly M. S. wife of the said W. K. party in this cause, was and is one and the same person and not divers, and that W. K. also mentioned in the said exhibit, and W. K., the other party in this cause was, and is one and the same person and not divers. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Third. That from and immediately after the solemnization of the said marriage they the said W. K. and M. K. lived and cohabited together at bed and board as husband and wife, and consummated their said marriage by carnal copulation and the procreation of — children; and from the time of the said marriage, they the said W. K. and M. K. so lived and cohabited together at —, in the county of —, afterwards at —, in the county of —, and then at the city of —, and at divers other places, and so continued to live and cohabit together until on or about the — day of the month of —, in the year of our Lord —, when the said M. K. quitted W. K., and they the said M. K. and W. K. finally ceased to cohabit together under the circumstances hereinafter particularly pleaded. And the party proponent doth further allege and propound that during the time they so lived and cohabited together, they have constantly owned and acknowledged each other as and for a lawful husband and wife, and were and are so commonly accounted, reputed and taken to be, by and amongst their families, neighbours, friends, acquaintances and others. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Fourth. That shortly after the marriage of the said W. K. and M. K. as heretofore pleaded, he the said W. K. commenced a lewd and adulterous intercourse with a female named A. W., who was resident in the —, and was in the frequent commission of adultery with the said A. W. from such time until the latter end of the month of —, in the year of our Lord —; that such

adultery was committed by the said W. K. and the said A. W., as well at the house of the said A. W. herself, situate in —, as in the open air, and also in divers brothels or houses of ill fame in the said — of —, and more particularly in a house of ill fame situate in —. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Fifth. That in or about the month of — in the year of our Lord —, he the said W. K. commenced a lewd and adulterous intercourse with a female named E. H., that from such time until in or about the month of —, in the year of our Lord —, the said W. K. and E. H. were in the frequent habit of repairing together to the house of —, at —, where they went to bed together, and had the carnal use and knowledge of each other's bodies, whereby the said W. K. and E. H. committed the foul crime of adultery. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Sixth. That in or about the month of —, in the year of our Lord —, the said W. K. accompanied a female named C. S. to the house of T. J. where they retired to and were seen naked and alone together in one and the same bed, and they the said W. K. and C. S. then and there had the carnal use and knowledge of each other's bodies, whereby he the said W. K. committed the foul crime of adultery. And this was and is true, public and notorious, and the party proponent doth allege and propound as

Seventh. That the person who had the carnal use and knowledge of the bodies of A. W., as pleaded in the 4th article, of E. H., as pleaded in the 5th article, of C. S., as pleaded in the 6th article of this libel, and W. K., the party in this cause, was and is one and the same person and not divers; and that each and every of the several females of whose body also the said W. K. had the carnal use and knowledge, as pleaded in the said several articles of the said libel, was and is the female in each several article named, and was not and is not M. K. the wife of W. K. (the party proceeded against in) and the party promoting this cause. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Eighth. That the said W. K. is or was of the diocese of —, and province of Canterbury, and therefore and by reason of the

letters of request from the Rev. ———, Clerk, Master of Arts, Vicar-General and Official Principal of the Consistorial and Episcopal Court of ———, presented to and accepted by you the Official Principal aforesaid, or to and by your Surrogate, and also by reason of the appearance given on his behalf, is subject to the jurisdiction of this Court. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Ninth. That of and concerning all and singular the premises, it was and is rightly and duly complained to you the Official Principal aforesaid, and to this Honourable Court. And this was and is true, public and notorious, and the party proponent doth allege and propound as before.

Tenth. That all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame and report, of which legal proof being made, the party proponent prays right and justice may be effectually done and administered to him and his party in the premises, and that she may be pronounced and decreed to be divorced and separated from bed, board and mutual cohabitation with the said W. K. her husband, by reason of the adultery by him committed, by you, and your definite sentence or final decree to be given in this behalf, and that you will further do and decree in the premises what shall be lawful, the party proponent not obliging himself to prove all and singular the premises, nor to the burthen of a superfluous proof, against which he here protests and prays, that so far as he shall prove in the premises he shall obtain in his petition the benefit of the law being always preserved to him, humbly imploring the aid of your office in this behalf.*

No. XI.

CURIOUS SPECIMEN OF *VIVA VOCE* PLEADINGS IN THE
ENGLISH COURTS, IN THE REIGN OF EDWARD II.†

The case was this: *Aleyne de Newton* brought his writ of annuity against the abbot of Burton upon Trent, and demanded

* 4 Chitt. Gen. Pr. p. 195.

† See *ante*, p. 712.

£30 arrears of an annual rent of £45, and he declared that one John, abbot of Burton, and predecessor of the present abbot, did, by assent of the convent, grant an annuity to *Aleyne*, payable twice in the year, till he was advanced to a convenable benefice; and he exhibited a specialty containing, that the abbot, by assent, &c., did grant an annuity to *Aleyne de Newton, Clerk*, in the above manner, as he had declared. Upon this *Willuby* (as counsel for the defendant) prayed judgment of the writ, because of the variance between the writ and the specialty; for in the writ he was named *Aleyne de Newton*, but in the specialty *Aleyne de Newton, Clerk*. *Ward* said that it was no variance; yet *Willuby* maintained, that as he might have a writ agreeable to the specialty, if he varied in his own purchase of it, the writ would be ill; but he could in this case have a writ agreeable to his specialty. *Ergo*, &c. And again, as far as appeared by the specialty, it was made to some one else, and not to the person named in the writ. *Stonore*, one of the justices, said, "Then you may plead so if you will, but the writ is good," therefore *respondeas ouster*.

Then, said *Willuby*, He cannot demand this annuity, because we say, that John, our predecessor, on such a day, &c., tendered him the vicarage of, &c., which was void, and in his gift, in the presence of such and such persons, which vicarage he refused; wherefore we do not understand that he can any longer demand this annuity. *Shard*—We say this vicarage was not worth 100 shillings; therefore we do not understand it to be a *convenable* benefice, so as to extinguish an annuity of £40. *Willuby*—Then you admit that we tendered you the vicarage, and that you refused it, &c.? *Shard*—As to the tender of a benefice which was not convenable, I have no business to make any answer at all. Then *Mulford*, one of the justices, asked, What sort of benefice they considered as *convenable*, so as to extinguish the annuity? *Shard*—We mean one of ten marks at least. Then *Stonore* said, Do you admit that the vicarage was not worth 100 shillings? *Willuby*—We will aver that the vicarage was worth ten marks, *prest*, &c.; and he has admitted that one of that value should extinguish the annuity. *Shard*—And we will aver that it was not worth ten marks, *prest*, &c.

After this issue, *Willuby* was desirous of recurring back to his first plea, and said, As you declare that the vicarage was not worth 100 shillings, we will aver that it was worth 100 shillings, &c. But *Stonore* interposed, and said, He declares that the vicarage is worth ten marks; and after that there is nothing to be done, but that the issue should be taken on your declaration or his: now it seems that it should rather be taken on yours; for, by your plea, you make that a convenable benefice which is worth ten marks, and such a declaration you ought to maintain, &c. *Willuby*—The mention of the value came first from him, when he said it was not worth 100 shillings; so that it will be sufficient for me to traverse what he had said. But *Stonore* pressing him whether he would maintain his plea, *Willuby* said he would, and accordingly pleaded that the vicarage was worth ten marks, *prest*, &c. *et alii*, that it was not worth ten marks, *prest*, &c., and so issue was joined.

The pleadings upon the record in the above case must then have stood thus: The defendant said a vicarage had been tendered and refused, and so the annuity should cease, judgment of the action. To this the replication was, The vicarage tendered was not worth ten marks, and so not a convenable benefice to extinguish the annuity: rejoinder, it was worth ten marks: surrejoinder, it was not.

These instances, without troubling the reader with more, will serve to show the manner of pleading *ried voce* at the bar; everything there advanced was treated as a matter only *in fieri*, which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest, or of the court, according as it was a point of law or of fact."*

* Reeve's Hist. of Eng. Law, vol. ii. pp. 347—349.

No. XII.

SPECIMEN OF SCRIBLERUS'S REPORTS.*

STRADLING v. STILES.

Le report del case argue en le commen banke devant tous les justices de le mesme banke, en le quart. An. du raygne de roy *Jaques*, entre *Matthew Stradling*, plant. & *Peter Stiles*, def. en un action propter certos equos coloratos, *Anglicè*, pped horses, post. per le dit *Matthew* vers le dit *Peter*.

SIR JOHN SWALE, of Swale-Hall in Swale-
Dale fast by the Riber Swale, kt. made his
last Will and Testament: in which, among other Be-
quests was this, viz. Out of the kind love and respect that I bear
unto my much honoured and good friend Mr. *Matthew Stradling*,
gent. I do bequeath unto the said *Matthew Stradling*, all my black
and white horses. The Testator had six black horses, six
white horses, and six pped horses.

Le recitel del
Case.

The Debate therefore was, Whether or no
the said *Matthew Stradling* should have the said
pped horses by virtue of the said Bequest.

Le point.

Atkins apprentice pour le pl. moy semble que
le pl. recobera.

Pour le pl.

And first of all it seemeth expedient to consider what is
the nature of horses, and also what is the nature of colours;
and so the argument will consequently divide itself in a
twofold way, that is to say, the formal part, and substantial
part. Horses are the substantial part, or thing bequeathed:
black and white the formal or descriptive part.

Horse, in a physical sense, doth import a certain quadrupede
or four-footed animal, which, by the apt and regular disposition
of certain proper and convenient parts, is adapted, fitted, and con-
stituted, for the use and need of man. Yea so necessary and
conducive was this animal conceived to be to the behoof of the

* See ante, p. 840. (n).

commonweal, that sundry and divers acts of Parliament have from time to time been made in favour of horses.

1st Edw. VI. Makes the transporting of horses out of the kingdom no less a penalty than the forfeiture of £40.

2nd and 3rd Edward VI. Takes from horse-stealers the benefit of their clergy.

And the statutes of the 27th and 32nd of Henry VIII. condescend so far as to take care of their very breed: These our wise ancestors prudently foreseeing, that they could not better take care of their own posterity, than by also taking care of that of their horses.

And of so great esteem are horses in the eye of the common law, that when a Knight of the Bath committeth any great and enormous crime, his punishment is to have his spurs chopt off with a cleaver, being, as master Bracton well observeth, unworthy to ride on a horse.

Littleton, Sect. 315, saith, If tenants in common make a lease reserving for rent a horse, they shall have but one assize, because, saith the book, the law will not suffer a horse to be severed. Another argument of what high estimation the law maketh of an horse.

But as the great difference seemeth not to be so much touching the substantial part, horses, let us proceed to the formal or descriptive part, viz. what horses they are that come within this Bequest.

Colours are commonly of various kinds and different sorts; of which white and black are the two extremes, and consequently comprehend within them all other colours whatsoever.

By a bequest therefore of black and white horses, grey or pyed horses may well pass; for when two extremes, or remotest ends of any thing are devised, the law, by common intendment, will intend whatsoever is contained between them to be devised too.

But the present case is still stronger, coming not only within the intendment, but also the very letter of the words.

By the word black, all the horses that are black are devised; by the word white are devised those that are white;

and by the same word, with the conjunction copulative, and, between them, the horses that are black and white, that is to say, pyed, are devised also.

Whatever is black and white is pyed, and whatever is pyed is black and white ; *ergo*, black and white is pyed, and *vice versa*, pyed is black and white.

If therefore black and white horses are devised, pyed horses shall pass by such devise ; but black and white horses are devised ; *ergo*, the pl. shall have the pyed horses.

Catlyne Serjeant: may seeme al' contrary, the plaintiff shall not have the pyed horses by intendment ; for if by the devise of black and white horses, not only black and white horses, but horses of any colour between these two extremes may pass, then not only pyed and grey horses, but also red and bay horses would pass likewise, which would be absurd, and against reason. And this is another strong argument in law, *Nihil, quod est contra rationem est licitum* ; for reason is the life of the law, nay the common law is nothing but reason ; which is to be understood of artificial perfection and reason gotten by long study, and not of man's natural reason ; for *nemo nascitur artifex*, and legal reason *est summa ratio* ; and therefore if all the reason that is dispersed into so many different heads, were united into one, he could not make such a law as the law of England ; because by many successions of ages it has been fired and refired by grave and learned men ; so that the old rule may be verified in it, *Neminem oportet esse legibus sapientiores*.

As therefore pyed horses do not come within the intendment of the bequest, so neither do they within the letter of the words.

A pyed horse is not a white horse ; neither is a pyed a black horse ; how then can pyed horses come under the words of black and white horses ?

Besides, where custom hath adapted a certain determinate name to any one thing, in all devises, testaments

and grants, that certain name shall be made use of, and no uncertain circumlocutory descriptions shall be allowed; for certainty is the father of right and the mother of justice.

Le rest del argument jeo ne pouvois oyer, car jeo fui disturb en mon place.

Le court fuit longement en doubti' de c'est matter; et apres grand deliberation eu,

Judgment fuit donne pour le pl. nisa causa.

Motion in arrest of judgment, that the pyed horses were mares; and thereupon an inspection was prayed.

Et sur ceo le court advisare vult.

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ERRATA ET CORRIGENDA.

- Page 17 (n), line sixth from the bottom, *for* "Chapter viii.," *read* "Chapter xi."
- " 262, *for* "Chapter V.," *read* "Chapter VI."
- " 262, line third from the top, *for* "Payne," *read* "Foss."
- " 274, line seventeenth from the top, *for* "Tables," *read* "Years."
- " 280 (n), line fourth from the bottom, *for* "Part," *read* "Chancery."
- " 238, line twelfth from the bottom, *for* "il faut claircir e'l'histoire," *read*
"il faut éclaircir l'histoire."
- " 348 (n), line third from the bottom, *insert after* "Jones v. Sheare," *the*
letters "7 Carr. & P."
- " 329, line seventeenth from the top, *for* "parties," *read* "partners."
- " 353, line second from the top, *for* "to," *read* "for."
- " 459, line eighth from top, *for* "February," *read* "April."
- " 879, line eleventh from top, *for* "those," *read* "there."
- " 904, line fourth from bottom, *dele* "by."
- Passim.*—Note, wherever Comyns' Digest is mentioned, the apostrophe is erroneously placed. It ought to be "Comyns' Digest"—not "Comyn's"—its author being "Sir J. Comyns."

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